## SUBJECT INDEX.

## ALPHABETICAL INDEX OF AUTHORITIES.

# Supreme Court of the United States

ROBERT B. BROWN,
*Petitioner*

*against*

No._____

THE UNITED STATES OF AMERICA,
*Respondent.*

_____ TERM

On Writ of Certiorari To The United States Circuit Court of Appeals for the Fifth Circuit To Review a Judgment of That Court Affirming the Decree of the District Court of the United States for the Southern District of Texas.

## BRIEF FOR PETITIONER.

### Statement of the Case:

This case is brought here upon a writ of certiorari issued by this court to the United States Circuit Court of Appeals for the Fifth Circuit on the 9th day of June, A. D. 1919.

Petitioner was indicted in the United States District Court for the Southern District of Texas on January 8th, 1918. The indictment was endorsed, "Murder Committed on land acquired for exclusive use of United States, Vio. Sec. 272 and 275 Penal Code, 1910." Trans. pp. 5 to 9.

The indictment, omitting parts not essential to the determination of the issues herein presented, was as follows:

"The grand jurors of the United States • • • • present:

"That long prior to the 7th day of May, A. D. 1917, the United States of America acquired within the geographical limits of Beeville, Bee County, Texas, within the division, district, and circuit aforesaid, a certain lot, tract, and parcel of land for the public purpose of the said United States of America, said land being in three separate tracts as follows, to-wit:

* * * *

"That after the acquisition of said land, and long before the 7th day of May, A. D. 1917, to-wit—on the 21st day of September, A. D. 1915, constitutional and exclusive jurisdiction over the site of said lot, tract and parcel of land was ceded to the United States of America by the said State of Texas in the manner provided by law; that from the date of the deed of cession of jurisdiction to the present time the site aforesaid has been under the exclusive jurisdiction of the United States of America and was under the exclusive jurisdiction of the United States of America on May 7, 1917, and now is under the exclusive jurisdiction of the United States of America.

"That one Robert B. Brown, on the 7th day of May, A. D. 1917, in said district, division and circuit, aforesaid, and on that said lot, tract and parcel of land hereinbefore more particularly described theretofore acquired by the United States of America for the exclusive use of the United States of America for its public purposes, the said lot, tract and parcel of land then and there being a place under the sole and exclusive jurisdiction of the United States of America and out of the jurisdiction of any particular state, and within the jurisdiction of this Court, constitutional and exclusive jurisdiction over said lot, tract and parcel of land having been ceded to the United States of America by the said State of Texas in the manner provided by the law long prior to the com-

mission of the offense hereinafter alleged; did unlawfully, etc.

* * * *

"And so the Grand Jurors aforesaid, upon their oaths aforesaid, do further say and charge, that upon the day aforesaid, at the place aforesaid, on the said land acquired by the United States of America for its exclusive use, as aforesaid, with the said deadly weapon, and in the manner and form aforesaid, and used as aforesaid, the said Robert B. Brown did unlawfully, willfully, purposely, and with his malice aforethought, kill and murder the said James P. Hermes, a human being, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America." (Trans. pp. 5 to 9).

The sufficiency of the indictment was questioned on the ground:

(a): That it charged no offense against the laws of the United States.

(b): That it charged no offense within the territorial jurisdiction of the United States in that there was no allegation that the homicide occurred on lands acquired by the United States for one of the purposes mentioned in Sec. 272.

1st: By motion to quash, Trans. p. 12, which was overruled by the court, to which defendant excepted. (Trans. p. 13).

2nd: By motion in arrest of judgment after conviction, Trans. p. 262. This motion was also overruled by the court, and petitioner excepted. (Trans. p. 265).

The issues of fact in the case were (a) whether the homicide was committed in self-defense or not, and (b) if the homicide was culpable, whether defendant was guilty of a greater offense than manslaughter, or assault with intent to murder.

Petitioner was tried and found guilty of murder in the second degree, and sentenced to fifteen years confinement in the penitentiary at Atlanta. Trans. p. 266 Motions for new trial and in arrest of judgment were overruled, and respondent excepted. Trans. p. 266. Respondent sued out a writ of error. Trans. p. 300. The judgment of the District Court was affirmed by the Circuit Court of Appeals.

## EVIDENCE ON ISSUE OF SELF-DEFENSE.

### (A): TESTIMONY OF THREATS.

J. A. CARVEL, a witness for the defendant, testified, Tr. of Rec. pp. 179-180, as follows:

**Direct Examination.**

"I live in Orange Grove. I am a deputy collector of the Internal Revenue of the United States for the Third District of Texas. Before entering the internal revenue service, I was cashier in the State Bank at Orange Grove. Before going to Orange Grove I was at Beeville. I knew Jim Hermes. I also knew Bob Brown. My relations were friendly with both of them. I was cashier and clerk at the S. P. Depot where I lived. My duties brought me in contact with Mr. Hermes. Mr. Hermes made threats concerning Mr. Brown during the year 1914. I think it was in the latter part of August, 1914. I cannot state on how many occasions specifically he made these threats to me, but it was several times. The first time he stated to me that he had trouble with Brown once, and that the next time they would have trouble they would have to carry one of them off in a pine box. His manner at the time was he was so angry that he was crying with rage when he said it. Mr. Brown was not there at the time, and had done nothing to him at the time that I knew of. In talking

about Brown he would get so excited and angry that he would start crying about it. He would not boo-hoo out loud; he would just shake and tears would start to run down his eyes. I conveyed this information to Mr. Brown. I told him this in a casual conversation, that Mr. Hermes had gotten into a fuss with me about this proposition, and I told Brown on the street. During the course of this conversation, that I had with Hermes, he pulled two knives out of his pocket, and said if I wanted to start anything he was ready. In regard to how he pulled out the knife, I was telling awhile ago about this warehouse ruling, which was the cause of it. Hermes came in there and said, 'What do you mean by trying to keep me out of the warehouse?' I said, 'I do not mean anything by it, but we expect to check the freight up before we deliver it.' He said, 'I expect you are trying to favor Bob Brown now; I do not expect you are keeping his men out.' I told him that we were not making any discriminations, that we had to keep everybody out. That was when he whipped out the two knives and asked me if I wanted to start anything, that he was there.

"He said he had trouble with Brown once before, and that if they ever met again one would be carried off in a pine box. Just before he said that he pulled his knife. Prior to that time Mr. Hermes had made similar communications to me two or three times. On the other occasion, in a casual conversation, he brought up the subject of why he disliked Mr. Brown. It was at the depot and before the quarrel I had with him, probably a month or two. He said he did not hate a soul, but Bob Brown, he hated him like poison, he said he had had trouble once before, and that he had been whipped, and that if they ever met again there would be a different tale. One would be carried off in a pine box. Mr. Brown went to the depot about this time on his business. Mr. Hermes

went there too. Mr. Brown came very seldom to the depot himself. I know why Mr. Brown quit coming to the depot." Plaintiff's Brief, pp. 167-169.

JAMES McCOLLUM, a witness for defendant, testified, Tr. pp. 178-177, as follows:

"My name is Jim McCollum. I live in Beeville. Have lived there all my life, except seven years. I was employed in a saloon in Beeville, working with my brother before the saloons were closed there. They were closed in February, 1916. I remember the incidents in the saloon, when something occurred between Brown and Hermes. It was in September or October, of 1915. I was behind the bar, three or four of us were talking when Hermes came in. Those who were in there with me were Mr. Murphy, Mr. Brown, Mr. O'Reilly and Mr. McCollum. Hermes came in at the door, and said something to Mr. Brown, and Mr. Murphy stopped him. Hermes had a knife in his hand. Mr. Hermes seemed to be angry at the time he came in. Walter Malone came in about the time Murphy stopped him. He was a peace officer at the time. Malone took the knife from Hermes. I think Hermes then produced another knife. I did not see that. I was behind the bar. Mr. Malone then took him outside of the building. I know he produced another knife because I heard the boys in front of the bar say so. I heard the statement just as Malone took him outside at the time. They said he came out with a second knife after Murphy had taken the first one away from him. Mr. Malone did not have to resort to any force. He just took it away from him. He just asked him to give him the knife. Hermes said when he came in, 'Brown, you mean that for me?' Brown said, 'I was not talking about you,' and Brown tried to apologize to him, and he told him that he could not apologize to him.

**Cross Examination.**

"When Hermes came in to the door they were standing at the bar and I was behind it. Brown and others were standing in front. They were just talking. They had had a drink. I do not know how long they had been there. I had been there only about 30 minutes when it occurred, and found them there when I came in. I think I served them some drinks. I do not know how many rounds. I could not say whether I served them one drink or two. To the best of my recollection, when Hermes came he said to Brown, 'You son-of-a-bitch, you mean that for me.' Brown said, 'No, Hermes, I was not talking about you. I did not know you were out there.' That all happened in just a minute, and then Malone came in. Brown tried to apologize to him, and he told him he was not talking about him, and Hermes said, 'You can't apologize to me.' This was after he called him a son-of-a-bitch. Brown did not resent it at all, and did not make an offer to resent it."

J. M. PICKETT, a witness for the defendant, testified. Tr. of Rec., pp. 165-166:

**Direct Examination.**

"My name is J. M. Pickett, I live at Beeville. I lived there in May, 1917. I knew Mr. Jim Hermes at that time. I knew Mr. Bob Brown by sight, but if I ever spoke to him I do not remember it. A day or two before the homicide I met Mr. Hermes on Washington street in Beeville. I walked up to where he was on Saturday morning before the homicide. When I walked up they were in a conversation, and someone called Bob Brown's name just as I walked up, and Mr. Hermes says, 'Yes, I ought to have been around there to have cut his damned head off.' That was all I heard. After this statement by Mr. Hermes was made a hearse passed by, before I walked

up to them. I saw it pass just before I got to them, and Mr. Hermes said, that he did not know who was dead, and he said, 'I guess it will be me next.' "

JOE THORNTON, Sheriff and Peace Officer of Bee County for 20 years, testified: Tr. of Rec. 163:

**Direct Examination.**

"I knew Brown and Jim Hermes in his life time. I knew them both well. Prior to the homicide I had occasion to and talk to Mr. Hermes in the street near the back part of Rees' saloon. I met Hermes in the street. I had talked to him before about his and Brown's trouble, and tried to reason with him that the best thing to do was to quit before somebody got hurt, and he told me to go to hell—that it was none of my business. That was the first time he ever talked mad to me about it, but I had talked to him several times before that. That was about all he said, he walked off one way and I another. The second meeting I came from home and met Mr. Hermes on his wagon, coming from the depot. I was going to the depot and I asked him if he and Brown were having more trouble, and he told me they had had, but it was over. Mr. Hermes said he did not want to make friends with the damned cowardly son-of-a-bitch. He exhibited a weapon at the time. I have seen Mr. Hermes with two knives several times. One was a large one-bladed Barlow, and the other was an ordinary pocket knife.

Q: At the time of the decease of Mr. Hermes did you secure the knives that were on his person at the time?

A: I got two knives from the undertaker, Mr. Walker.

Q: Have you those knives with you?

A: No, sir. I turned them over to Mr. Brennerman who well as I remember that was the morning train, or the even-

ing train from Corpus. Harry Brown was Bob Brown's son. When I got there Hermes had his knife out, and had Harry Brown standing leaning up against the wall of the depot, and Hermes was telling him that he had as much right to solicit trade there as he had, and that he did not want to have any trouble with him, and he was cussing Mr. Brown to Harry, and told him, 'I will cut your head off,' and he told him something about, using the big knife he had on Mr. Brown, but as well as I remember it the knife he had in his hand then was a small pocket-knife.

"He had Harry Brown up against the wall of the depot. Harry was something like 17 or 18 years old at that time. He is in the United States service now. I went to Mr. Hermes, and got hold of him, and told him to put his knife up, and told Harry to go on off, and he went. Mr. Hermes was there standing with his knife in his hand, holding it up like this. He was mad. I do not know to what extent, he was mad and abusing the boy, talking about using his knife on him. Another time I made him put up his knife, when Mr. Ruebush (witness interrupted). I do not remember how many times Brown asked me about having Hermes put under a peace bond. I know he came to me one time, and I told him to go and talk to Mr. Thornton about it. He was the sheriff. I represented himself as a Federal officer, and took his receipt for them.

Q: Will you describe those two knives that you got and turned over to Mr. Brennerman? (He was not permitted to answer).

PAUL PERKINS, a witness for the defendant, testified as follows, Tr. of Rec. pp. 182 to 184.

**Direct Examination.**

"My name is Oscar Francis. I live in Skidmore. I have lived there for six years. I am a car inspector for the S. A. & A. P. Ry. running through the town of Beeville. I was at the train one day and I saw Mr. Hermes there at the time. There was some difficulty. The difficulty was with Mr. Brown's son. That was the one he spoke of. I did not know the young man. He was a fleshy kid, and when the difficulty was over I inquired who the boy was, and they said it was Mr. Brown's son. That was some 3 or 4 months before the homicide. The trouble came up about something, I never paid much attention to it. I went over there to do some work, and I had just finished the job, and was going back on No. 11. It was 6:25 in the afternoon, that was the time the train was due, and it was just pulling in. I did not see the first part of it, I saw Mr. Hermes, or a man supposed to be him; I did not know him at the time; I paid attention after he drew the knife, and I eased up close to where they were at, and they were crowding around; he drew the knife, and I did not know the exact words he said, but there was something that he made some threat about he was going to fix his daddy; I could hear something about jumping on his daddy, and he said something about he would fix him. He pulled the knife on the young man. He looked like he was about 18 or 20, Mr. Brown's son. He was pretty close to the young man when he drew the knife; pretty close to him. I eased up there because I did not want to see him over-run, in case that nobody else interfered. I did not want to see him over-run the kid with a knife, but I believe it was Mr. Perkins who came up about that time. He was constable. He interferred and made him put the knife up I believe. After a good little bit, after Mr. Perkins had made

him put the knife up, and he kept talking, and he put his hands in his pocket and got another one out, and with the two in his hand shook them that way. One of them was an average size, and the other one was smaller. I believe one of them was a Barlow, a bone-handled knife. I never paid much attention to it. I was in a hurry to get to the train. One was pearl handled I believe, and the other was a bone or horn handled knife. Mr Hermes was very much stirred up. He was awful ly mad apparently—awful angry."

HIRAM CHENEY, a witness for the defendant, testified. Tr. of Rec., pp. 186.

**Direct Examination.**

"My name is Hiram Cheney. I live in Beeville, Bee County. I am a farmer. I saw a difficulty between Mr. Rue-bush and Mr. Hermes in the town of Beeville. It occurred in the Busy Bee Restaurant either in January or February. I heard a threat made by Mr. Hermes in regard to Mr. Brown. He said he had the change for Mr. Brown. At the time he was standing there with his knife in his hands. He acted like he was mad to me. I was in the restaurant at the time this happened."

IKE ARCHER, a witness for defendant, testified:

**Direct Examination.**

"My name is Ike Archer. I live in Beeville. I knew Mr. Hermes in life time. I have known him ever since I lived in Beeville, about twelve years. I remember when they started to build the postoffice at Beeville, and started the excavation. I remember the time of transferring some person's household goods there along about that time or before then. I was working for Mr. Robert Brown at that time. I have worked for Mrs. Hermes since the death of Mr. Jim Hermes. I had

a conversation with Mr. Hermes there one Sunday soon before the beginning of this excavation. I was coming out of the city one Sunday, me and my wife. I went around by Mr. Berry's, and Mr. Hermes waited on the corner and met me, and said, "Hello Nigger," and he walked on down toward the ice plant, and I was on the walk holding my little colt eating grass, and he said, "You know, Ike, that boy of Bob Brown's liked to have run in to me the other day." I said, "Yes." He said, "Don't you think that Bob put him up to it?" I said, "Mr. Hermes, Mr. Brown didn't know that his boy." (Witness interrupted). Well, he says to me, "This boy was coming down the street with his automobile, and he liked to have run into my mules," that he did not know whose boy he was until he had passed him, and Mr. Miller said it was Mr. Brown's boy, Leonard. Mr. Hermes said that he believed Mr. Brown put the boy up to do this, that him and Mr. Brown had had a row, and Brown would not fight him when he had his knife, and he said Bob was going to ask him to throw away his knife, if they had another difficulty, and he was going to throw one away, but the other one he was going to keep it, which was the bigger one, and the little one he showed me, the one he was going to throw away, and the big knife he was going to put up his sleeve. He said he was going to use the knife on Brown. That is part of it, but you all won't let me tell the conversation like I heard it. I was sitting on the side walk, and he said, "See here, nigger," and he showed me the knife. I don't know what sort of knife it was, I did not pay any attention to it. He said he was going to put his knife up his sleeve. I do not know how many knives Mr. Hermes ordinarily carried. On that day he had two knives. He had one little knife and a big knife. I do not know what sort of knife the big knife was. I told Johnnie Ruebush about this.

It was done on Friday and I told Johnnie on Monday. I was hauling dirt all the morning on the day of the homicide, back and forth."

RUFUS TAYLOR, a witness for the defendant, testified, Tr. of Rec. 181, as follows:

**Direct Examination.**

"My name is Rufus Taylor. I live in Beeville. I have lived in Beeville 26 years. I am cashier for the G., H. & S. A. Railway. I knew Mr. Hermes in his life time. I saw him every day before the date of his death. He has made threats to me with reference to Mr. Bob Brown on several occasions. It was Friday afternoon before he was killed on Monday. That was the last occasion that he made a threat to me about Bob Brown. Hermes made the remark that Mr. Miller claimed they were having some trouble over the dirt at the postoffice building, and Hermes told Miller that if there was anything else to come to let him know; that if he could not settle it he would fix Mr. Brown. They had had some trouble before about some package, and he was telling me about it at the depot. He told me that he had it in for Brown, that he had offered to make up with him, but that he did not have a temper that way, that when once he got it in for a man he could not make it up. He told me that Brown had made the offer to make up. He said if ever they had any racket again, that one or the other of them would have to buy a black box. I do not know exactly when this was. There was something coming up all the time I was at the depot. There was always difficulty some way or other with Hermes and his competitors. I had a conversation with John Ruebush, after this conversation, on Friday night. We were neighbors, and happened to be in the yard at the same time. I told him about the circumstances. We discussed the situation.

JOHN RUEBUSH, a witness for defendant, testified as follows, Tr. of Rec., pp. 169-169, 169-170, 171-173:

**Direct Examination.**

"My name is John Ruebush. I live in Beeville. I was employed during the month of May by Robert B. Brown in the transfer business. I had been working for him about seven years. My duties were that I met trains, hauled trunks and got freight and rustled business. I knew Mr. Jim Hermes ever since I have been in Beeville. I know Mr. Rufus Taylor, the agent of the S. A. & A. P. Ry. I have known him ever since I have been there. Mr. Taylor told me Friday night before it happened on Monday that Mr. Hermes was up at the depot talking to him, that Sol Miller had told him that Brown said that he could not get any more of that dirt, and that he wanted to see him about it, and Mr. Taylor said that he told him he was going to get in trouble about listening to Sol Miller's tales. Taylor told me he had said that if he said any more about it to tell him and he would go down and fix Brown. He said he would fix Brown. I told Brown that I think it was Saturday morning when I was riding down on the wagon that I told him.

"I told Mr. Brown that Archer told me the next time Hermes jumped on him and he asked him to throw away his knife, that he was going to throw his little knife down, and snatch his big knife out and cut him. I told Brown this about a week or ten days before it happened. Mr. Hermes directly communicated to me a threat. He jumped on me in a restaurant and shook a knife at me. I told Mr. Brown that he shook a knife in my face, and Hermes said that he had the change for me and Brown both. Prior to that at the Aransas Pass depot, I heard Mr. Hermes make a statement about Mr. Brown.

That was about a year I think before it happened. I told it to Mr. Brown. I told him that Hermes said the next time that he and Bob Brown had a fight that one or the other of them was going to take a black box. That was all Hermes said at that time. I heard him say one day in front of the depot about six or eight months before that that him and Bob Brown had a fight, and that Brown whipped him, and that he got his gun with the intention of killing Brown, but that one of his friends took his gun away from him."

(B) TESTIMONY OF OVERT ACTS AT TIME OF HOMICIDE SHOWING PURPOSE TO CARRY THREATS INTO EFFECT AND ALSO OF ACTUAL FELONIOUS ASSAULT ON PETITIONER BY DECEASED WITH INTENT TO KILL PETITIONER.

ROBERT B. BROWN, defendant, testified, in his own behalf. Tr. of Rec., pp. 195-199, 199, 200-201, 202, 203 and 204:

**Direct Examination.**

"My name is Robert B. Brown. I am the defendant in this case. I was 44 years old the 28th of this month. I am a man of family. I was born in Clinton, DeWitt County, Texas. I reside in Beeville. I resided there about 20 years, I think, to the best of my recollection. I was engaged in the transfer business in Beeville. My duties are overseeing it. I operated wagons. I remember the excavation, the beginning of the excavation of the postoffice building over there. I remember about when it was when it commenced, in a general way. It must have been in April of last year. I have heard the testimony in regard to the killing of Mr. Hermes. I went down to the site of the postoffice excavation and building on the day the witnesses have spoken about, on the 7th of May, 1917, in the afternoon. I took arms down there with me that after-

noon. When I left it was sprinkling a little, it had rained the day before. I went to town on one of my wagons. I had four. A negro driver by the name of Ike Archer went with me. I took a six-shooter with me—a forty-one. It had six chambers. The reason I carried my pistol down there that afternoon I had heard about Hermes and his threats, and I carried it down there to protect myself. I heard the threats from Reubush. Reubush and Carvel had warned me in the matter. I had had previous difficulties with Mr. Hermes. Prior to that time Mr. Hermes had assaulted me with a knife. I had been at work hauling dirt ever since a few days after the postoffice site work commenced. I had done the excavation work for the Government, except the first two days. In taking out the dirt we put clay dirt in 2 or 3 different places. We took the black dirt first from the excavation. The black dirt was placed on the west side of what we called the pit. The white dirt was up against the black dirt for a certain distance, and then for another distance from the light pole to the end down to the street it was all white dirt. The white dirt was on the east side next to the pit, and the black dirt was on the west side of the white dirt next to the alley. That dirt formed the dump we have been talking about here. The dump was about 5 or 6 feet high. I think it was higher in some places than it was in others. The dump was about 150 feet long. It ran from the street back to the back line. I had been on that work all the time, from the time of the excavation to the day of the homicide. I had at no time interfered with Mr. Hermes or Sol Miller in getting dirt there. I knew Mr. Hare. With reference to the Government work he was foreman of the building. It was between 3 and 3:30 that Miller drove up. I was standing at the back facing east against the light post. I was engaged in checking loads from the wagons that they loaded.

I had not at any time prior to that during the period that I had been at the excavation, or during the period that the dirt was being hauled, ever interferred in any way with Miller or Hermes in their getting dirt there. My attention was first called to the wagon when I heard it coming in behind me, and it drove up and stopped. I then stepped away from the post and walked on down south. The wagon was facing north. The post was right in the edge of the dump. As I walked to the south I was walking on the dump. Mr. Miller was at the front of the wagon, and Hermes back of it. I did not see Mr. Hermes at first. I saw Sol Miller first. I just told Mr. Miller that Mr. Hare had asked me to tell them not to haul away the black dirt, that he wanted to use that. He did not make any reply, but Mr. Hermes took it right up, and said, 'God damn you; you are not running this dirt proposition. I came up here to see about it,' and he ran his hand in his pocket and came up the dump with his knife open, and I ran toward my gun, lying back, and I picked up my slicker; I backed and kept backing until I could get my gun out of the slicker. At that time Hermes was striking at me with his right hand—with a knife in his hand. As Hermes came up the dump I told him to stop. He did not stop. I had to go back about 25 feet, 20 or 25 feet to where I got my gun out of my slicker. Mr. Hermes must have been 4 or 6 feet from me at the time I reached down and got my gun out of my slicker. After I got the gun out the slicker I told him to stop. He just kept coming, striking at me. When I got the gun I told him to stop, and I fired it. When I fired the shot I was running backward. He was coming forward toward me. He had a knife in his hand. The blade looked about 3 or 3½ inches long. I thought Mr. Hermes was trying to kill me. He had drawn a knife on me twice before that. Prior to that time I had re-

Q: Then what?

A: Mr. Lutz took his knife away from him."

* * * * *

Q: Mr. Brown, after that, did you continue in the transfer business?

A: Yes, sir.

Q: When was the next time that he assaulted you?

A: It was in the McCollum saloon.

Q: What happened there; tell the jury as near as you can recall?

A: Mr. Tom Clare, and John Murphy and Reilly were standing in there, laughing and joking."

* * * * *

"I did not give any provocation to Mr. Hermes of any character at that time. I had not spoken to Mr. Hermes at the time of the assault. He came running in there with his knife open. Very mad, and Murphy caught him. He said that I was talking about him. Mr. Malone came in and took that knife from him. He was still very mad, and pulled out another knife, and Malone took that away from him, and I told him that if I had said anything, which I had not, that I would apologize to him, and he said, 'You son-of-a-bitch, you can't apologize to me.' At the time he said this he was in the custody of the officer, Malone, took him off. After that I went back to my horse in front of Mr. Teal's market to go home. Mr. Hermes had threatened my life that way several times in all. Mr. Carvel, Mr. Ruebush, Mr. Parr and Harry had told me of the threats which he had made. After Mr. Hermes made the assault on me in the saloon, I quit going to the depot only when I had to. I consulted Mr. Perkins and Mr. Thornton, sheriff and constable about that. I endeavored to have Mr. Hermes put under a peace bond. I talked to the

officers about putting him under a peace bond but they never did it. After that I never did anything to Mr. Hermes. I kept out of his way, and made it a point never to meet him if I could help it. Johnnie Ruebush and Jack Carvel had both communicated threats to me, one of the threats that Ruebush told me of was from Rufus Taylor. The last one was communicated to me Saturday before the homicide. Johnnie told me that he said that if I interfered any more with that dirt that he would 'fix my clock.' That is what he told Mr. Taylor. In the light of what had gone before I understood he was going to kill me. I had received word before through Mr. Carvel that the next time we would have a fight, there would be one of us to go off in a black box. Johnnie Ruebush told me that Hermes had told Ike Archer that he was going to fix my clock, that he was going to have two knives; throw one away, and the big knife he would have up his sleeve to cut me with. I knew that Hermes had two knives at the time he pulled them in the saloon. At the time he pulled the other knife I never did see but one. When I was on the dump going backward, Hermes was coming pretty fast, as I was stepping back about as fast as anybody could run backwards without falling. I was stepping back as fast as I could without falling. When Hermes and Sol Miller drove up, I did not say to Hermes, 'You came here for a fuss,' and Jim did not say, 'No, I do not want any trouble with you.' I did not say to Hermes, 'You damned son-of-a-bitch, you have been trying to pick a fuss all of the week.' I did not speak to Hermes at all, only told him to stop. I was talking to Miller. Hermes had not been at the dump that week—I had not seen him. I had not seen him at the dump for seven or eight days. I had been going to the dump every day to superintend. It was necessary in the transaction of my business for me to go down there. I had an office and

telephone headquarters in Hunt's garage. Will Hoolihan had been hauling dirt with Mr. Miller up to the time of this load. I thought when they drove up it was Hoolihan, up to the time Mr. Hermes spoke. I would not have spoken to them if I had known it was Hermes. After Hermes fell, after the third shot, and as he went to fall, I stepped around, two or three steps toward his feet. I was very much excited during the period. At the time I shot him what was in my mind was that he was going to kill me with a knife."

* * * * *

**Cross Examination.**

"It must have been over two years ago that Hermes attacked me in the saloon. Somewhere in 1915, I would not say for sure. It was about two years ago, from the time this offense happened somewhere along there, I could not say for sure. It might have been the middle of 1916, or the first of 1916. I could not say exactly. The trouble in the depot was about nine years ago, somewhere in that neighborhood, I could not say exactly. On the day I killed Hermes when I first saw the wagon, it drove up right behind me, I heard it before that, but I never noticed whose wagon it was. There had been other wagons there—there was Mr. Bell and others hauling. My wagon came up to the east side of the dump, and this wagon came up on the west. When it stopped I walked away from the telephone post. I did not know that Hermes was there. I knew there was somebody on the back of the wagon. When I first saw Hermes he was on the back of the wagon raising the side boards. I said to Miller that Mr. Hare said not to haul off the black dirt, that he wanted to use it for his own use. Miller did not say anything. Hermes took it up. he said, 'God damn you, you are not running this dirt busi-

ness, and I came down here to see about it.' He said, 'God damn you, you are not running this dirt proposition.' I did not say, 'You son-of-a-bitch, you can't get any of it.' He then came up the dump with a knife in his hands. He was about as far as from here to that table when he said, 'You are not running this dirt proposition. (Referred to a table about ten feet from witness). It would be further than that, he was on the ground, I suppose about 20 or 25 feet. He got out his knife then, and came up the dump. He commenced cutting at me when he got close to me. He was four or five feet from me. He was coming with his knife in his hands. I said he was 4 or 5 feet away when he struck at me. He was holding up his knife, striking at me all the time, from just before the first shot. He got as close to me as 2½ or 3 feet with that knife. I do not think he ever struck me with it. I was not cut. He did not cut my clothes. He was still striking when I fired the second shot. He was just coming this way. (Illustrating). I cannot say how many times he struck at me before I shot at him the first time. He struck more than once. I could not say for sure. He struck as many as two times. I am certain that he struck at least two times. I was very excited. He then kept coming. He then got closer than he was at first, and he was 2½ or 3 feet at first. At the second shot he was closer than at the first. I could not say exactly. He was closer than he was at the first shot, still striking. At the third shot he had his knife in his hand, and he caught the gun with his left hand. He was still striking at me. I pulled his hand off the gun. About that time I fired, as his hand came off the gun. He then fell. When he went to fall I stepped back and let him fall. After the third shot I hit him. He was standing up when I hit him. I said he fell after the third shot. I did not say right after the third shot. He fell after the third shot.

I shot the third shot before he fell. When I hit him with the gun he was still coming at me, and still striking at me.

Q: How many times did he strike after the third shot? I do not want you to make any mistake on this. After you had fired one, two, three shots, and after that third shot, he was still standing and coming forward, striking at you with that knife?

A: He came toward me.

Q: He was coming forward, was he not?

A: Yes, sir.

Q: He was still coming forward and striking at you with the knife, is that correct?

A: When I hit him with the gun he was.

Q: And that was after the third shot, was it not?

A: Yes, sir.

Hermes then fell. I could not say whether when I hit him with the gun it knocked him down or not. He fell and turned to the left. Not with his back toward me. He turned around facing me when he fell. He turned around about that far (illustrating), and then fell. That would be in the general direction of his back toward you. He was falling all the time. I was on his right side when he fell. I did not walk from the left to the right. I heard several of the witnesses testify. I say it is not correct when they say I was on his left side when he fell, and then walked around to his right. When he fell down flat, I had my gun up this way, and I went to let the hammer down and it went off accidentally. I do not know which way the gun was pointing, but it went off accidentally. I did not intend that shot to hit him. I could not say where it hit him. I did not do anything to help him, after he was down. I did not intend to kill him when he was lying on the ground, but I did not go to see if that accidental shot

had killed him. I don't say I did not care. I was excited. I do not know what I thought. I asked Sol Miller, 'Why did you bring him here?' I tell the jury that I was trying to let the hammer down, and the gun accidentally shot him, and I did not intend to shoot him that fourth time. I did not tell anybody to go to him, to help him. I never said anything to anybody. I walked on off. Hermes was left there. I went over to the courthouse. He was not begging me not to shoot him, and I was not talking to him there.

**Re-Direct Examination.**

"The gun was not a self-cocking gun. The shooting was all right now. I hit him after the third shot; just after I jerked it out of his hand I hit him."

JOHN RUEBUSH, a witness for defendant, testified as follows: Tr. of Rec., pp. 169-169, 169-170, 171-173:

**Direct Examination.**

"On the day of the difficulty I was hauling freight out of the Sap depot, at about 3 o'clock and 20 minutes. The train came in, I think, about 3:20. That was the northbound. I saw Mr. Hermes there at the depot. He was working the train as usual. I saw him after that. Sol Miller was hauling dirt, and him and Sol Miller was standing at the back of his wagon, and Hermes was nodding his head, and acting like—— (Witness interrupted). Mr. Green:

We object.

Mr. Dougherty: State what his facial expression was.

A: I would judge he was mighty angry.

* * * * *

"Mr. Hermes was a good little piece from me. About 40 or 50 yards. I have seen Mr. Hermes when he was angry before that. He looked like he was mad to me. That is all I

can tell you. While this conversation was going on, they were standing right at the end of the Sap depot, close to the front platform, behind the wagon. Mr. Hoolihan was on the front of the wagon. I think Mr. Miller had been driving, but Hooli han was holding the mules. They stayed there just a minute or two. Miller went on and dumped the dirt, and Hermes went along by the postoffice, and when I came out Hermes and Miller were both on the wagon, and they drove around to where they were getting dirt. I went ahead and went to Gregory's and to the telephone company. I went to Gregory's store, and had delivered the freight, and collected the money, walked to the back door, and looked out when they drove up. They drove in and turned around and Brown was standing by an electric light pole and they drove close to him, and he got out of the way and walked on the dump, and Hermes jumped off the wagon, and started up on the dump. It seemed that he kinder slipped back, started again and went up. When he went up Brown started off going off sideways, trying to get out of his way, and running over his slicker. He grabbed his slicker up in his hands and began to shake it, and by that time they had run behind the little house and when they ran behind there I heard the first shots fired, and when I ran out of the door the second shot was fired. I saw them at the second shot. Brown was backing and Hermes was crowding him. I mean by that he was going on to him. They were about four or five feet apart. The next thing I saw Hermes make a grab at the gun, and Brown throwed the gun up, and Hermes grabbed at the gun with his left hand and throwed his left hand around and the third shot was fired, and Hermes wheeled and fell about half way past Mr. Brown, and he fell kinder on his shoulder, over to one side, and then he got up in a kind of a humped position. Brown kinder took a step

or two before his feet and had his gun toward his side and the fourth shot was fired. Then Brown took his gun from his left hand to his right hand and walked on off. I was in the back of the Gregory store in the door. The store was kinder north from the difficulty, across Bowie Street. The house that got in line between me and the parties was a pretty good sized little toilet out there. I could not say whether Hermes had a knife or not. At the third shot they were right up at one another in grabbing distance.

Mr. Dougherty (Resuming)—Show the jury what you meant Hermes was doing with his right hand.

A: Well, I could not tell exactly; he grabbed at the gun with his left hand, and his right hand was going around that way (illustrating); I could not see what he was doing; it fied as follows: Tr. of Rec., pp. 173-174 and 175:

DAVE STOCKBRIDGE, a witness for defendant, testi-
looked like he was striking at him in some way."

"Two shots first attracted my attention to the difficulty. I turned around to see what it was. Back of me, the way I turned to look, I saw up on a pile of dirt thrown out of this excavation two men, the defendant, Mr. Brown, and the deceased, Mr. Hermes. Mr. Hermes was going toward Mr. Brown, and looked as if he was trying to strike him, and to be reaching for him. He was endeavoring to strike him with his right hand. He was reaching, striking like this (making motions). It looked to me all the time that he was going towards him. He was reaching like this with his left hand (illustrating). With his right hand he seemed to be striking like and reaching. They were not more than 2 or 3 feet apart. I could not see from where I was whether or not Hermes had anything in

his hand. I did not think about that; I saw him for a few seconds. I did not see anything in his hands. I do not know whether he had anything in his hand or not. The two shots that had been fired attracted my attention, and I saw Hermes going after Brown. They continued to go for several steps, and I saw him shoot the third shot. I was standing at just a little angle off of a direct line from the way the gun was pointing, and I thought about moving, so I turned and walked off around the north side of the excavation. Meantime the fourth shot was fired, while I was going to the north side of the hole, and I turned and looked back and Hermes was on the ground down and Brown was walking off, going north."

* * * * *

**Cross Examination.**

"There was nothing between me and Hermes' hand to obscure my vision in any way. I was about 30 steps from Hermes at that time. I could see his hands, but I do not think I could have seen anything in them in the short time I was looking at them at that distance. I mean to leave the inference to the jury that he had something in his hand there, that he had something in his hand. I think he had a knife. I think this, because he was reaching."

J. A. DOUGHTY, a witness for defendant, testified as follows. Tr. of Rec., pp. 148 to 152:

**Direct Examination.**

"My name is J. A. Doughty. I am 61 years old. I knew Jim Hermes in life time something like 15 years and Mr. Bob Brown something like 15 years. My relations with both were friendly.

"I was at the scene of the difficulty that resulted in the death of Mr. Hermes on May 7th, 1917. I happened to be

idle, and had no work in my line, and I went around over there where the men were working. My line of work was windmill and water supply work. I was down in the basement there where they were putting in some concrete, and I was on the east side of it; in the pit. I was very few feet from the east side of the pit. I do not suppose I was more than 4 or 5 feet. From where I was standing I had a view of the whole dump, except a little at one end where there was some wagons. That was the north end. The first I saw of the difficulty I heard some say, it sounded to me like 'Stop.' I looked up and saw them on the dump. It seemed to me that Mr. Brown made the statement 'Stop.' At the time I saw them Mr. Hermes was getting up on the dump when I first saw him. Mr. Brown was up on the dump. The next thing I saw Mr. Brown was backing off. He was backing a good deal in the direction, and a little to the south of where I saw, backing sort of up in that direction, only a little south. He was on the dump. He backed several feet, and Mr. Hermes was crowding him, and striking as I thought with a knife from the licks he was making. Mr. Brown was backing until he came to where his gun was on the dump, and he picked that up and kept backing. His gun was in a slicker. To get it out, he grabbed up the slicker and unrolled it. He commenced shooting then and Hermes was crowding him closer. I could not tell how close they were together at the third shot exactly, but they were pretty close together, looked to me to be mighty close together. After the third shot there was a fourth shot, and then Mr. Hermes fell, and Mr. Brown walked off. I never heard any conversation between Mr. Brown and Sol Miller after that shooting. I heard him, Brown, say, 'What in the world did you bring him here for?' or words just about similar to that. I could not tell just ex-

actly what effect the third shot had more than some of the other shots. It looked like Mr. Hermes started falling about the third shot, just a second afterwards the best I could tell. He fell sort of to this side, and went down on his back like. I did not see Mr. Brown fire the fourth shot, because he was directly between me and Mr. Hermes. Hermes, it looked like, was passing that way as he started to fall, and Mr. Brown started to move this way like, and was right between me and Mr. Hermes. When I saw Mr. Hermes come up on the dump, pretty close to the north end, the best I could tell a few feet from the north end of the dump. Being right on the other side of Mr. Brown from him, I could not tell how far Mr. Brown was from Mr. Hermes when Mr. Hermes got up on the dump, but he was a few feet away. At that time Brown was backing off from him, he had not gotten his gun at that time. I saw Brown when he stooped to get his gun. At that time Hermes crowded up pretty close and made a motion like he was cutting at him. Mr. Brown retreated from where he got his gun to where Mr. Hermes finally fell, at least 18 or 20 feet."

**Cross Examination.**

"I say that Hermes had his hands up like he was cutting at Brown with a knife. He made several licks. That was when the first shot was fired, and I think maybe before the first shot. I did not see any knife. I was not close enough. I was some 85 or 90 feet from him. Hermes kept striking pretty often. I suppose he did not reach Brown with any of them. I could not tell how far he was from him at the second shot; he was pretty close. Nearly close enough to strike him, but it looked like he did not strike him. I could not tell you whether he was as close at the second as the first shot.

Hermes' position, after the first shot, looked to be the same until the last. He was striking all the time until about the time he began to fall. Every time he was in reach it looked like he would strike, but as to how many times I could not tell. I then saw him fall. He sort of turned as he fell, and came right back. He was not striking at Brown while lying on the ground. I did not say he was on his back. I said when he fell, he fell back that way. (Illustrating). He sort of turned that way and went down. The best I could tell he went back on his arms. Brown did not shoot him after he was on the ground. The best I could tell, when the fourth shot was fired, was about the time when Hermes started to fall."

JOE THORNTON, sheriff of Bee County for over twenty years, testified as follows: Tr. of Rec., pp. 166-167.

**Direct Examination.**

"After I had put Mr. Brown under arrest the condition of the palm of his right hand was powder burned. It was powder burnt clear across there, about as wide as a man's finger. I got him water to wash it off. That was immediately after the homicide. I suppose it may have been five minutes after the homicide, hardly so long."

HOMER LEE McKINNEY, a witness for the defendant, testified. Tr. of Rec., p. 160:

**Direct Examination.**

"My name is Homer Lee McKinney. I live in Beeville. Have lived there about 25 years. I was in Beeville on the day of the killing of Mr. Jim Hermes. I was at the scene of the homicide immediately after the killing. I saw Mr. Joe Thornton there. He is sheriff. He was summoning witnesses for an examination trial, I believe. I went over to speak to Mr. Thornton. I called his attention to a slicker that was lying

there on the dirt that was thrown out of the basement of the postoffice building, and also a coat. While I was there I saw Mr. Sol Miller. He came up to where Mr. Thornton was. I was standing with Mr. Thornton, and then he came up. He came to see him, Mr. Thornton, not me. Mr. Sol Miller said to Mr. Thornton, 'Mr. Thornton, Paul Perkins knows how come me with Jim Hermes' knife.' He said that in my presence. He made no further explanation of it. When Sol Miller made this statement to Mr. Thornton, Thorton was going toward the court house at the time, and I do not know that he said a word to him. If he did I did not hear him.

On issue that the shot which inflicted the mortal wound was the third shot, and not the fourth shot, see testimony of Robert B. Brown, Petitioner, Trans., pp. 197-198.

Brown testified in affect that the third shot inflicted the fatal wound, that when Hermes fell on the ground after the third shot he was dying and that he, Brown, would not have shot him under such circumstances, but that in an effort to uncock the pistol and in the excitement of the moment the pistol was discharged. This fourth shot, under this statement, was the one inflicting the wound in the leg—which was not a mortal wound.

On issue that Brown was at his place of business at the time of the homicide he testified, (Tr. of Rec., pp. 195 to 196), that he was employed by the Government to handle the excavation for the building, and at the time was engaged in superintending the removal of the dirt.

In submitting the issue of self-defense, the court charged that it was the duty of defendant, though without fault on his part and notwithstanding he was being feloniously assaulted by Hermes with a deadly weapon, to retreat, before he could resist such assault, and exercise his right of self-

defense. To this charge the defendant excepted. Trans. p. 244.

The portion of the charge herein complained of is set out in the second specification of error, infra. To this portion of the charge defendant excepted. (See Trans., p. 245). The defendant requested appropriate charges correcting the error which charges were refused and the defendant excepted. See Trans. pp. 252-254.

The Court did not submit the issue of assault with intent to murder, and of aggravated assault to the jury. (See Main Charge Trans. p. 232 to p. 242. See also Special Charge No. 14, Refused. Trans. p. 258).

## ERRORS URGED UPON THIS APPEAL.

### 1.

The Circuit Court of Appeals erred in not holding that the District Court erred in overruling defendant's motions to quash the indictment and in arrest of judgment, because the indictment did not charge an offense against the laws of the United States, and did not charge an offense within the territorial jurisdiction of the United States, in as much as the indictment, which was based upon the second sub-division of Paragraph Third of Section 272 of the Penal Code, did not charge that the place where the homicide occurred was acquired by the United States for the erection of a fort, magazine, arsenal, dock-yard or other needful building. Assignments of Error Third to Sixth. Trans. pp. 270-271.

### II.

The Court erred in Paragraphs 10, 11, 13-B, 13-C, 14 and 15 of its charge to the jury, and in submitting the issue of self-defense, wherein it imposed on defendant, though feloniously assaulted, the obligation to retreat before he could exercise his right of self-defense, viz:

## CHARGE OF THE COURT ON THE ISSUE OF SELF-DEFENSE:

"10: Under the plea of not guilty, the defendant is entitled to show, if he can by the evidence, that the homicide was committed in the lawful defense of himself. But, it is necessary to remember, in considering the question of self-defense, that the party assaulted is always under the obligation to retreat, so long as retreat is open to him, provided he can do so without subjecting himself to the danger of death or great bodily harm."

"11: If you believe from the evidence, that the defendant, shot and killed James P. Hermes, at the time when the said James P. Hermes was making an assault upon the defendant, with a dangerous or deadly weapon, that is, with a weapon capable of inflicting death or great bodily harm, and under such circumstances as to put a reasonable man in the position of the defendant in fear of his life, or great bodily harm; and such circumstances would appear to a reasonable mind, as making retreat or attempted retreat dangerous to his personal safety; then the defendant would be justified in standing his ground, and resisting the attack with all necessary force; even to the taking of the life of his assailant; and in such case you would find the defendant not guilty.

"13-B: If, however, you believe from the evidence, that at the time of the killing it would have appeared to a reasonably prudent man, situated as the defendant was, and in the circumstances of the defendant, that the defendant was armed with a deadly or dangerous weapon, and the defendant had reasonable ground to believe that the deceased, from the mode and manner of the use of such weapon, was about to inflict on defendant, or that there was apparent danger of his inflicting upon defendant death or some serious bodily injury; and re-

treat was apparently dangerous, then you are instructed, that under such circumstances the defendant would be justified in resisting the assault with all necessary force, even to the extent of killing the assailant.

13-C: If you believe from the evidence, that previous to the homicide there had been communicated to defendant threats of the deceased to kill defendant or do him serious bodily harm, and that at the time of the difficulty the acts and words of the deceased, accompanied with demonstrations evincing a purpose to put into effect such threats in such a manner as to create in the mind of a reasonable man a reasonable apprehension or fear that the deceased was then and there about to carry such threats into execution and to inflict upon defendant death or serious bodily harm; then you are instructed that the defendant had the right to use such force as would be reasonably necessary to protect himself; provided that he was unable to retreat and avoid the conflict, or that an attempt to do so would have appeared dangerous to a reasonable man under the circumstances of the attack.

14: If you believe from the evidence that at the time of the homicide the deceased made an assault upon the defendant with a deadly weapon, and defendant's knowledge of the character and disposition of the deceased would have caused a reasonable man in the situation of the defendant to have entertained fear of death or serious bodily injury; when retreat or any attempt to retreat would have appeared dangerous to a reasonable man, and that, acting under such reasonable fear, the defendant killed the deceased in repelling the assault, then you should find the defendant not guilty.

15: If the deceased was armed at the time of such assault, and was making such an attack on defendant, with a deadly weapon, as would put a reasonable man in fear of death

or serious bodily harm; then the defendant would be justified in believing that the deceased intended to kill or inflict serious bodily harm upon him, and if retreat would have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger of death or serious bodily harm, then the defendant was entitled to stand his ground, and repel force with force, even to the extent of taking the life of his assailant. Trans. pp. 236-239. To the giving these charges petitioner excepted. Trans. p. 245, and assigned error. See Assignment of Errors No. 24A, 24C, 25, 26, 30, 31, 32 and 33 Trans. 279, 287.

And the Court erred in refusing to charge the jury, though specially requested by Special Instructions Nos. 9 and 10, the converse of the proposition, that if the deceased, at the time of the homicide, was engaged in a felonious assault upon defendant with a deadly weapon, that defendant was not under any obligation to retreat, before he could exercise his right of self-defense, but had the right to stand his ground and resist force with force even to the extent, if necessary, of killing his assailant.

Assignments of Error Nos. 48 and 49, Tr. pp. 290, 291.

III.

The court erred in refusing to submit to the jury Special Charges Nos. 9 and 10, which were as follows:

"Special Charge No. Nine.

"Gentlemen of the Jury:

"The defendant was where he had a right to be when the difficulty arose, and if you believe from the evidence that the deceased advanced upon him in a threatening manner and with a deadly weapon, and defendant at the time had reasonble grounds to believe, and in good faith believed that the deceased intended to take his life, or do him great bodily harm, he was

not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him, in such way and with such force as under all the circumstances he, at the moment, believed and had reasonable grounds to believe was necessary to save his own life, or to protect himself from great bodily injury.

Refused January 18th, 1918.

Wm. B. SHEPPARD, Judge."

Trans. pp. 252-253.

"Special Charge No. 10.

"Gentlemen of the jury:

"The defendant had the same right to act upon the reasonable appearance of danger as upon real danger, and if you should believe from the evidence that the defendant was not in fact in real danger of death or serious bodily injury at the hands of the deceased at the time he killed deceased, but that the defendant reasonably believed he was in danger, and acting upon such belief killed deceased, you should acquit him.

"And you are instructed that if you believe from the evidence that at the time of the killing it reasonably appeared to defendant from his standpoint at the time from the acts of the deceased, that deceased was then and there about to inflict upon him, the defendant, death or serious bodily injury, whether such was the purpose of the defendant or not, and that there was thereby created in the mind of the defendant a reasonable expectation or fear of death or serious bodily injury, then defendant had the right to kill the deceased, and was not required to resort to any other means to repell said attack, nor to retreat in order to avoid the necessity of killing the deceased, and was authorized so to act, whether such danger was real or not, provided it appeared to him, the de-

fendant, to be real, viewed alone from his standpoint at the time.

"Refused January 18th, 1918.

Wm. B. SHEPPARD, Judge."

To the refusal to give said charge defendant excepted. See Trans., p. 253-254 and assigned error. See assignments of Error No. 48 and 49, Trans. 290-291.

IV.

The court erred in not submitting the issue of assault with intent to murder and aggravated assault to the jury, and in refusing special instruction No. 14 on such issues, requested by defendant, which was as follows:

"Gentlemen of the Jury:

"In this case there is evidence that the shot that killed the deceased was the third shot fired by the defendant.

"If you believe from the evidence that such was the case, or if you have a reasonable doubt as to whether he was killed by the third shot, or by the fourth shot, and you should further believe that the fourth shot was fired with malice aforethought, express or implied, but you have a reasonable doubt as to whether the third shot was fired under such circumstances that if death had resulted therefrom it would have been murder, you are, in such event instructed that you cannot find the defendant guilty of any higher grade of offense than assault with intent to murder, for the results of such fourth shot.

Refused January 18th, 1918.

Wm. B. SHEPPARD, Judge."

To the failure to submit such issues defendant excepted Trans., p. 246 and assigned error. See Assignment of Error No. 52, Trans., p. 293.

**FIRST POINT:**

**THE COURT ERRED IN NOT HOLDING THAT THE INDICTMENT UPON ITS FACE DID NOT CHARGE ANY OFFENSE EITHER AGAINST THE LAWS OF THE UNITED STATES, OR WITHIN THE TERRITORIAL JURISDICTION OF THE UNITED STATES.**

**ARGUMENT.**

The indictment as set out in full, pp. 5 to 9 transcript and see pages. 1-3 supra, purported to charge petitioner with the offense of murder committed on property conveyed to the United States for its "public purposes." It does not allege the character of the public purposes for which the property was acquired. In other words, it does not charge that the property was acquired for the purposes of the erection of a "fort, magazine, arsenal, dock-yard or other needful buildings," but alleges broadly that the property was acquired for "the public purposes of the United States."

An element of the crime of murder, under Sec. 272, is that the locus of the crime should have been acquired of the United States for one of the express purposes mentioned——

> "The crimes and offenses defined in this chapter shall be punished as herein prescribed. * * * "Third: * * * When committed within or on any lands reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, **or on any place** purchased or otherwise acquired by the United States by consent of the Legislature of the State in which the same shall be **for the erection of a fort, magazine, arsenal, dockyard, or other needful building.**" (See paragraph Third of Sec. 272).

It was under the second sub-division of paragraph "third" that petitioner was indicted.

This court has said in the case of United States vs. Hess, 124 U. S. 483, that

"The general and with few exceptions, * * * * the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omissions cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital."

In United States vs. Cruikshank, 92 U. S. 542, it was held:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In U. S. vs. Mills, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged;' and in U. S. vs. Cook, 17 Wall., 174 (84 U. S. XXI, 539), that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statutes, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

Again, in United States vs. Almeida, Federal Case No. 14,333, the court said:

> "It is not enough, and never has been, to charge against the party a mere legal conclusion, as justly inferential from the facts that are not themselves disclosed on the record. You may not charge treason, murder, or piracy, in round, general phrases. You must set out the act which constitutes it in the particular case."

In United States vs. Staats, 8 Howard, p. 41, it is stated.

> "The general rule is, that the charge must be laid in the indictment so as to bring the case within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it. Nothing is to be left to implication or intendment."

Since one of the elements essential to the punishment of murder under Section 272 is that it shall have been committed on lands acquired by the United States "for the erection of a fort * * * or other needful building," this element is not supplied by the charge that the locus of the crime was acquired by the United States for its public purposes. Public purposes of the United States are no doubt numerous, and property may no doubt be acquired for their exercise, but it is only where the lands on which the homicide is committed has been acquired for certain specific purposes that it becomes punishable as murder under Section 272.

Therefore, we submit that the indictment does not charge an offense against the criminal laws of the United States, and it was error to overrule the motions to quash and in arrest of judgment.

**The indictment on its face does not show that the offense was committed within the territorial jurisdiction of the United States and therefore the court erred in not sustaining the motions to quash and in arrest of judgment.**

The power of Congress to legislate concerning the places mentioned in Sec. 272 is derived from Art. 1, Sec. 8, Clause 17 of the Constitution. It is as follows:

> "The Congress shall have power to exercise exclusive legislation in all cases whatsoever over all places purchased by the consent of the Legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dockyards and other needful buildings."

It will be noted that the constitutional provision quoted above is narrower than the third paragraph of Section 272, to the extent that it does not contain the clause 'when committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof.'

This is due to the fact that as to all lands, not within the original states, acquired by the United States by treaty or conquest, it had plenary sovereignty, or what is termed areal jurisdiction, and the States could not and did not need to delegate to Congress the power to legislate thereon. As to such territory Congress had inherently as the legislative body of a sovereign nation, the power to legislate over its territory, which did not form part of the States and over which there was no sovereign jurisdiction save that of the national Government.

Congress from time to time, on the creation of new states, and their admission into the Union, reserved complete jurisdiction over certain lands or districts therein. The United States also acquired certain lands by treaty, purchase or conquest for its exclusive use. These are some of the areas alluded to as "reserved or acquired" in the first subdivision of Paragraph Third of Sec. 272, as distinguished from tracts ceded to the United States by the States for certain express purposes described in the second subdivision of such third paragraph of Section 272. This distinction was recognized by the Circuit Court of Appeals in its opinion herein, saying that "jurisdiction in the Federal Court was claimed by the Government under the following part of the third subdivision of Section 272:

> "On any place purchased or otherwise acquired by the United States by consent of the Legislature of the State in which the same shall be for the erection of a fort, etc."

United States vs. Tully, 140 Fed., p. 960.

See Chaplin's Principles of Federal Law, pp. 51 to 77. Sec. 79.

Power to legislate over the offense of murder of one private citizen by another is vested in Congress by Section 8, Art. 1, for murder is not an offense against the authority of the United States, only as it may occur within the territorial jurisdiction thereof. United States vs. Ward, 28 Federal Cases, No. 16629.

United States vs. Stahl, 1 Woolw. 194.

We submit that territorial jurisdiction over the offense charged must appear upon the face of the indictment and in the absence of appropriate allegations of fact showing such jurisdiction the defect can not be cured by intendment or judicial notice.

In United States vs. Davis, 5 Mason, 356, Fed. Cas. No. 14,730, page 783, it was said that the court could take judicial notice of a statute ceding jurisdiction of a place for a Marine Hospital. However Justice Storey continued:

> "We cannot judicially know that the place described in the indictment was purchased under the authority of that statute."
>
> "It should not be left in doubt, or to mere inference from the words of the indictment whether the offense charged was within Federal cognizance." Blitz vs. U. S. 28 Law. Ed. p. 727.
>
> "There must be an affirmation and distinct charge in the indictment. It is a familiar rule of criminal pleading and practice that nothing is taken by intendment. The facts must be charged and charged distinctly." Justice Brewer in U. S. vs. Morrissey, 32 Fed. 151.

In Early vs. Commonwealth, 24 S. E. 936 (Ga.) the indictment averred the offense was committed "within the jurisdiction of the court." The Supreme Court of Georgia passing on the sufficiency of the allegations said:

"Jurisdiction is said to be a matter of law, the place where the crime was committed a matter of fact. It is necessary to aver and prove the place where the crime was committed. It is not sufficient to aver as is done in this indictment that the offense was committed 'within the jurisdiction of the court,' which is a conclusion of law, but the indictment should have stated the facts, which gave the court jurisdiction. The demurrer to the indictment should have been sustained.

"An allegation in an indictment that the crime 'was committed within the jurisdiction of the court' is not an averment of fact, but a mere statement of a conclusion of law." State vs. Carlson, 62 Pac. Rep. 1019; Johnson vs. State, 58 S. E. Rep. 265.

The case of United States vs. Lewis, 36 Federal Rep. p. 449, was a prosecution under Section 5346 R. S. which provided that "every person who, upon the high seas * * * within the admiralty jurisdiction of the United States * * * * on board any vessel belonging in whole or in part to the United States or any citizen thereof with a dangerous weapon * * * * * commits an assault on another shall be punished." etc.

The information charged that the offense was committed on the high seas, but there was no allegation that it was committed on an American vessel. On motion to quash jurisdiction was claimed by reason of subdivision 1 of Section 563 of Revised Statutes, which gave district courts jurisdiction "of all crimes and offenses cognizable under the authority of the United States committed within their respective districts or upon the high seas, the punishment of which is, not capital, except," etc. The District Court, in passing upon the motion, said:

"It is long since settled that the courts of the United States have no common law, jurisdiction in criminal cases so far as the United States are concerned, there are no common law crimes; and that therefore its courts cannot take cognizance of any act or omission as a crime unless it has been made such by an act of Con-

gress. U. S. vs. Hudson, 7 Cranch, 32; U. S. vs. Bevans, 3 Wheat, 336.

"The only act of Congress making an assault on the high seas with a dangerous weapon a crime, is Section 5346 of the Revised Statutes (Section 4 of the Act of 1825); and one of the elements of the crime, as therein defined, is that the assault must take place on board of a vessel belonging in whole or in part to the United States or some citizen thereof. The information does not disclose the nationality of the vessel on which the alleged assault took place. To constitute a crime against the United States of which this court has jurisdiction, the assault must have taken place on board an American vessel, and that fact must be alleged in the pleading."

In the case of the Franklin vs. United States, 1 Colorado, p. 35, defendant was charged by indictment with the offense of murder committed "at the County of Gilpin. On appeal from a judgment of conviction and sentence of death, the indictment was attacked. One of the grounds upon which the Government relied to uphold the indictment was that Gilpin County was in fact in the Indian County at the time of the homicide, and that therefore, the indictment came within the terms of the act of April 30, 1790, which was as follows:

"If any person shall, within any fort, arsenal, dock-yard, magazine or any other place or district of county, under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons, on being convicted thereof, shall suffer death."

The court said:

"The principal question presented in this record is whether the place, where the crime was committed, was at the time of the offense within the descriptive terms of this act so as to give the district court jurisdiction of the offense. The indictment set forth that the crime was committed "at the Court of Gilpin" without further description of the place. If the act operates in the territories in the same way as in the several states, and to no greater extent; in other words, if the act operates in this territory, only within forts, arsenals, and other places, where the United States have exclusive jurisdiction in virtue of exclusive

ownership, it seems to be necessary under the act to aver in the indictment and prove upon the trial that the place is within the descriptive terms of the statute, and at page 43 id. the court said: "It was also said at the time of the offense Gilpin County was in fact in the Indian county. If so, the fact should have been averred in the indictment, and in the absence of such averment the court could not take jurisdiction upon that ground.

See also U. S. vs. Stahl, 1 Wool, 194. Opinion by Mr. Justice Miller.

## OTHER AUTHORITIES.

"The Constitution clearly implies the permanent use of the property purchased for the construction or erection of some of the structures designated or some other needful building. The right of exclusive jurisdiction can be acquired only by the United States in the mode pointed out by the constitution * * * * where the lands were purchased by the United States by the consent of the State for one of the specific and enumerated purposes." U. S. vs. Tierney 28 Fed. Cas. 16517.

"It is not competent for the Legislature to abdicate its jurisdiction over its territory, except where the lands are purchased by the United States for the specific purpose contemplated by the Constitution. The rule that legislative consent operates as a complete cession is applicable only to objects which are specified in the above provision." In re Kelly 71 Fed. 545.

In U. S. vs. Hopkins, Fed. Cas. No. 15,387-A, the facts were that the State of Georgia had ceded jurisdiction to the United States only in places purchased by the United States for forts or fortification: (Syllabus by the Court). "The Federal Court had no jurisdiction over land purchased and used for purposes of an arsenal."

"The consent of the States to the purchase of lands within

them for the special purposes named is, however, essential under the Constitution to the transfer to the general government with the title, of political jurisdiction." Id.

The case of Peyroux vs. Howard, 7 Peters, 331, is authority for the proposition that where the jurisdiction of the court depends upon facts in pais the limits of such territorial jurisdiction will not be judicially noticed, unless the boundaries thereof are of such notoriety that they may be judicially noticed as other notorious facts. In the case mentioned the admirality jurisdiction of the court at New Orleans depended upon whether or not the tide in the Mississippi ebbed and flowed as high up the river as New Orleans. The court said that this was an issue of fact, and declared that whether it could be judicially noticed depended upon the fact whether the ebb and flow of the tide at that point was notorious, and in this regard said:

> "It certainly cannot be laid down as a universal, or even as a general proposition, that the court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts, particularly with respect to geographical positions, of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the court may judicially notice."

The case of United States vs. Jackalo, decision by Mr. Justice Nelson, 66 U. S. pp. 484-488 is another case in point. The indictment charged that the offense was committed in waters within the admirality and maritime jurisdiction, on board of an American vessel called the "Spray." Jurisdiction of the United States court depended upon, whether the

offense was committed out of the jurisdiction of any of the States. There was a special verdict, finding that the offense was committed upon the "Spray," and also finding where the "Spray" was lying at the time, "by metes and bounds." It was left to the court to determine whether the place thus described was within the jurisdiction of the state. The Supreme Court of the United States said:

> "We have not referred to this boundary for the purpose of determining it, or even expressing an opinion upon it, but for the purpose of saying the boundary of the State, when a material fact in the determination of the extent of jurisdiction of the court, is not a simple question of law. The description of a boundary may be a matter of construction, which belongs to the court; but the application of the evidence in the ascertainment of it, as thus described and interpreted, with a view to its location and settlement, belongs to the jury. We do not think the special verdict in this case furnished ground for the court to determine whether or not the offense was committed out of the jurisdiction of the State."

The case of People vs. Collins, decided by the Supreme Court of California, reported in the 39th Pacific, page 17, is in point. Therein the court held:

> "The mere ownership by the United States of land or property within the county does not show any Federal jurisdiction over crimes committed upon it, as that fact does not oust the jurisdiction of the State; but the ownership must be acquired by purchase, with the consent of the Legislature, which is held to include the acquisition of property by eminent domain when that proceeding is authorized by the Legislature. U. S. vs. Cornell, 2 Mason, 60 Fed. Cas. No. 14,867; U. S. vs. Jones, 109 U. S. 513, Sup. Ct. 346. The Federal jurisdiction, therefore, involved a question of fact, viz—a purchase by the United States, or the acquisition of property by a proceeding to condemn it, and of such question courts will not take judicial notice. It is a matter of common knowledge that the United States occupies buildings for custom house, postoffice, and other purposes; but whether such buildings have been purchased by

the United States, or whether they are occupied under leases from private owners is a matter to be proved by the record of the conveyances. The information in question conforms to the statutory precedent given in section 951 of the Penal Code, in the particular under discussion, and as this court cannot, as a matter of law, say that the Federal courts have exclusive jurisdiction over any part of the city and county of San Francisco, the jurisdiction of the court is sufficiently alleged, and the objection here urged is not based on any evidence tending to show that the court did not, in fact, have jurisdiction. The exceptional character of the Federal jurisdiction is further shown by the precedents used in the Federal courts, which allege, not only that the place where the offense was committed was within the jurisdiction of such court, but that it was not within the jurisdiction of any State. What has been said points out the distinction between this case and the case of People vs. Wong Wang, 92 Cal. 281, 28 Pac. 270. There the offense was a misdemeanor, over which, if committed in the city of Los Angeles, the police court had exclusive jurisdiction, and as such jurisdiction was given by law, and therefore must be judicially noticed, it did not appear upon the face of the information that the superior court had jurisdiction, since its jurisdiction depended upon a fact which did not appear, namely, that it was committed in that part of the county outside of the city. The motion in arrest of judgment in the case at bar was properly denied."

The cases cited by the Circuit Court of Appeals relied upon by the Circuit Court of Appeals are not in point.

The case of Jones vs. the United States, 137 United States, 202-224, relied upon by the Circuit Court of Appeals, is not in point. There the facts were that under the laws of the United States, an unclaimed island in the Carribean Sea had been taken possession of by a citizen of the United States on behalf of the Government on the ground that it contained a guano deposit. The indictment alleged the necessary facts to show that the offense was committed within the territorial jurisdiction of the court. The indictment is a substantial copy of the

language of Sec. 5570 of the Revised Statutes, which, read in connection with Sec. 5576. fixed criminal jurisdiction under the old law. The elements of territorial jurisdiction as fixed by that statute, and as incorporated in the indictment, were:

FIRST—That the offense was committed on an island recognized by the United States as containing a deposit of guano.

SECOND—That such island had been recognized and considered by the United States as appertaining to the United States.

The allegation in the indictment in this case that the place had been ceded to the United States under the Texas statutes for the public purposes of the United States, is ambiguous and a conclusion of the pleader. The statement that the cession was made for the public purposes of the United States is necessarily ambiguous, because there are many public purposes of the United States, that do not come within those defined by the Constitution, Art. 1, Sec. 8, paragraph 17. Yet, this is the only allegation in the indictment upon which jurisdiction is endeavored to be sustained.

In the case of United States vs. Holt, 218 U. S. 245, the indictment contained the allegation that the offense was committed within the **Fort Warden Military Reservation.** This was a place (viz: a fort) within the express terms of Sec. 272. There is no such allegation in this case. Here we have the ambiguous expression that it was a place, jurisdiction over which had been ceded to the United States for its public purpose.

According to the decision rendered herein, in an indictment for murder, notwithstanding the fact that the place where the homicide occurred must have been acquired for a specific purpose as a jurisdictional element of the crime it is

not necessary to allege any fact save that the offense was committed within certain metes and bounds. The court will then take judicial knowledge (a) that the United States acquired it for one of the purposes mentioned in the Constitution and statutes; (b), that the State of Texas ceded jurisdiction over the place for such particular purpose.

## SECOND POINT.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT PLAINTIFF IN ERROR, THOUGH IN A PLACE WHERE HE HAD A RIGHT TO BE AND THOUGH THE DECEASED WAS MAKING A FELONIOUS ASSAULT UPON HIM, WITH INTENT TO KILL HIM, OR DO HIM SOME SERIOUS BODILY INJURY, WAS OBLIGED TO RETREAT, THOUGH WITHOUT FAULT ON HIS PART, TO THE DITCH OR WALL BEFORE HE COULD EXERCISE HIS RIGHT OF SELF-DEFENSE, AND SLAY THE DECEASED.

## ARGUMENT.

In the decision of the Circuit Court of Appeals, it is declared——

> (a): "The defendant was rightfully where he was at the time of the quarrel, **but was not on his own premises.**"
>
> (b): "A tendency of the evidence was to the effect that the deceased, Hermes, approached defendant, an open knife in his hands, with which he attempted to strike defendant. The evidence without conflict, showed that defendant on the approach of Hermes, retreated twenty or twenty-five feet to where he had left his rain-coat, in which was his pistol, and after obtaining his pistol from it, stood his ground, using his pistol with fatal effect."

See opinion of Circuit Court of Appeals, Tr. of Rec. pp. 321-322. The trial court charged the jury that it was the duty of defendant to retreat before he could resist force with force. (Tr. of Rec., pp. 236 to 238).

Paragraph 10 of the main charge was as follows:

"Under the plea of not guilty, the defendant is entitled to show, if he can by the evidence, that the homicide was committed in the lawful defense of himself, but it is necessary to remember in considering the question of self-defense, that the party assaulted is always under the obligation to retreat, so long as retreat is open to him, provided he can do so without subjecting himself to the danger of death or great bodily harm."

By Paragraphs 11 to 15 of the main charge, inclusive, the court reiterated to the jury that the obligation rested upon defendant to retreat notwithstanding he was feloniously assaulted before he could exercise his right of self-defense. The defendant excepted to these charges.

Appropriate charges were requested by defendant, instructing the jury that if defendant was feloniously assaulted, while at a place where he had a right to be, without fault upon his part, he had a right to stand his ground and resist force with force to the extent of slaying his assailant. These charges were refused. To this action of the court defendant excepted. See Charges Nos. 9 and 10, requested by defendant and refused. (Tr. of Rec. pp. 252-253).

These rulings were affirmed by the Circuit Court of Appeals.

The Circuit Court of Appeals relies upon the decision in Alien vs. United States, 164 U. S., p. 492. We submit that the decision in that case is not applicable to this case.

The Circuit Court of Appeals denied the right of petition

er to stand his ground, though in the right, on the sole ground that he was not on his own premises. We submit that this rule is not in accord with reason, and is not in accord with the law on the subject.

In determining whether defendant was compelled to retreat to the wall, before he could exercise his right of self-defense and kill his assailant, who was making a felonious assault upon him with a knife, resort must necessarily be had to the decisions of this court as also to the early common law of England, as this duty to retreat is not declared by the Federal law as an element of self-defense, and exists, if at all, as a part of the early common law, to which the Federal courts resort to ascertain the elements of any crime not declared by statute. We may, therefore, look to the early English authors and statutes to ascertain what the common law of England was at the time of the American Revolution on this subject.

The decisions of the states are in hopeless conflict. Some of the states have developed as their own common law "the rule of flight." The majority of the states however follow the rule of the early common law of England of "stand ground when in the right."

We submit that this court will not follow the common law of the states, but of England in determining the elements of the right of self-defense.

DUTY TO RETREAT—IT DID NOT EXIST IN CASES OF JUSTIFIABLE HOMICIDE OR JUSTIFIABLE SELF-DEFENSE AT THE COMMON LAW.

There is direct conflict in the decisions of the states on the subject. The cases are divided into two classes, those which hold to what is termed the "flight rule," and the others to what is termed "stand ground when in the right rule."

The early common law has always been recognized by the

United States courts as a part of the body of the criminal law of our government insofar as resort must be had to it to supply any failure upon the part of the statutes in defining the ingredients of an offense or the elements that must enter into it in order to make an act criminal.

In the case of United States vs. Palmer et al, 3 Wheaton, p. 613, the second question presented to the court was whether the crime of robbery mentioned in the eighth section of the [illegible] Congress is the crime of robbery, as recognized and [illegible] at the common law. Replying to this question, Chief Justice Marshall said:

> "The second question proposed in this case is one on which I presume there can be no doubt, for the definition of robbery under this act we must look for the definition of the terms in the common law."

In the case of United States vs. Smith, 5 Wheaton, p. 160, Mr. Justice Storey said:

> "When the act of 1790 declares, that any person who shall commit the crime of robbery, or murder, on the high seas, shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definition of these terms as they are found in our treaties of the common law. In fact, by such a reference, the definitions are necessarily included as much as if they stood in the text of the act. In respect to murder, where "malice aforethought" is of the essence of the offense, even if the common law definition were quoted, in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would remain to be gathered from the common law. There would then be no end to our difficulties, [illegible] definition, for each would involve some terms which might still require some new explanation."

Again in Pettibone vs. United [illegible], 148 U. S. 203, Mr. Chief Justice Fuller said:

"The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated."

The common law referred to is the law of England as it existed prior to the American Revolution. See 12 Corpus Juris, p. 198, declaring that English decisions rendered prior to the Revolution are usually considered conclusive evidence of what the common law is. In the same paragraph, the writer declares that the early standard works on the subject of the common law are strong evidence of what it was.

We assert that the early common law, as declared by all of the standard authors on criminal law, is identical with what is termed the "stand ground when in the right rule."

## THE EARLY COMMON LAW.

(1): A person who was feloniously assaulted, and not himself in fault, could exercise his right of self-defense without the necessity of retreating to the wall whenever he was at a place where he had a right to be.

(2): If the assault was not felonious, or the difficulty arose in an affray or sudden encounter, and in the course thereof, it became necessary for the slayer to kill his assailant, then before he would be justified in doing so, he must retreat to the wall.

In short, it was the difference between justifiable self-defense and excusable self-defense, corrolaries respectively of "justifiable homicide," and "excusable homicide."

It seems to us that the confusion or rather the conflict in decisions as to whether or not, at the early common law, one who was feloniously assaulted by another was compelled to retreat, before he could exercise his right of self-defense,

is due to the fact that this distinction between excusable or justifiable homicide has never been, or at least in but few cases, clearly recognized. The clearest distinction between these two grades of homicide is made in third American edition of Russell on Crimes, page 506 et seq.

It is very clear from the text of this work that the duty to retreat was only imposed in the case of excusable homicide, and never in the case of justifiable homicide. It must be noted too, that the author cites in support of the text, Hale, East, Foster et al. In justifiable homicide, this duty of retreat was not imposed upon a party assaulted feloniously by another in an effort to commit a known felony upon him, such as murder, robbery, rape, arson and the like. Excusable homicide was divided into two sorts, either per infortunium, by misadventure, or se et sua defendendo. We are not concerned with the first sort. The last sort or subdivision has been mistakenly treated as homicide in true self-defense, due, no doubt to a literal translation of the Latin phrase. As a matter of fact excusable homicide se et sua defendendo was not homicide in true or perfect self-defense, at the common law, but was homicide in a chance medley or sudden recounter where an element of blame attached to the slayer and according to Lord Coke, under such circumstances at the common law, the defendant would have suffered death, but under the statute of Gloucester he was pardoned at the forfeit of his goods and chattels.

In all cases of excusable homicide, the slayer was assaulted suddenly, but not feloniously, or the necessity for the homicide arose in an affray or sudden encounter, in which the slayer was not an entirely unwilling participant, therefore not entirely blameless. The common law required that the person under such circumstances who killed another in his

own self-defense (se et sua defendendo) should have retreated as far as he could conveniently to avoid the violence of the assault before he turned upon his assailant.

A wise provision, for the assaulted party was not entirely blameless—this principle is yet incorporated in the laws of all the states, in the general rule, that in mutual altercations there must be abandonment by the slayer of the difficulty before his right to kill in self-defense arises.

In the case of justifiable homicide, however, the rule was entirely different.

There are several phases of justifiable homicide, such as homicide by execution, homicide by officers killing in the course of arrests, officers dispersing mobs in cases of riots, etc., and the class of homicides with which we have to deal, which was termed, by Russel, homicide in the prevention of any forcible and atrocious crime. This class is placed by him on the same basis of freedom from blame as the first three. The rule laid down (Russell on Crimes, 3rd American Ed., at page 519) on the right to defend one's person against violence is stated as follows:

> "A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends and endeavors, by violence, or surprise, to commit a known felony upon either. **In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable.** But it has been holden, that this rule does not apply to any crime unaccompanied with force, as picking of pockets. It seems, therefore, that the intent to murder, ravish, or commit other felonies attended with force or surprise, should be apparent, and not left in doubt; so that if A makes an attack upon B, it must plainly appear by the circumstances of the case (as the manner of the assault, the weapon, etc.) that the life of B is in imminent danger, otherwise his killing the assailant will not be justifiable self-defense.

"Excusable homicide is of two sorts; either per infortunium, by misadventure, or se et sua defendendo, upon a principle of self-defense. The term excusable homicide imports some fault in the party by whom it has been committed, but of a nature so trival that the law excuses such homicide from the guilt of felony, though in strictness it deems it to be deserving of some degree of punishment. It appears to be the better opinion, that the punishment inflicted for this offense was never greater than a forfeiture of the goods and chattels of the delinquent, or a portion of them, and, from as early a time as our records will reach, a pardon and writ of restitution of the goods and chattels have been granted as a matter of right, upon payment of the expenses of suing them out.

"Excusable homicide in self-defense is a sort of homicide committed **se et sua defendendo**, in defense of a man's person or property, upon some sudden affray, considered by the law as in some measure blameable, and barely excusable." Id. 519 *et seq.*

"When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by killing the person who assaults him, and excuse himself on the ground of self-defense. But, in order to entitle himself to this plea, he must make it appear, first, that before a mortal stroke given he had declined any further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid immediate death. Under such circumstances, the killing will be excusable self-defense, sometimes expressed in the law by the word chance medley (and it has been written by some chaud medley), the former of which in its etymology, signifies a casual affray; the latter an affray in the heat of blood, or passion. Both of them are pretty much of the same import; but the former has, in common speeches, been often erroneously applied to any manner of homicide, whereas it appears by one of the statutes, and the ancient books, that it is properly applied to such killing as happens in self-defense upon a sudden encounter.

"Homicide upon chance medley borders very nearly upon man-slaughter, and, in fact and experience, the boundaries are in some instances scarcely perceivable, though in consideration of law they have been fixed. In both cases it is supposed that passion had kindled on each side, and

blows have passed between the parties; but in the case of man-slaughter, it is either presumed that the combat on both sides had continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. And the true criterion between them is stated to be this: When both parties are actually combating at the time the mortal stroke is given, the slayer is guilty of man-slaughter; but if the slayer has not begun to fight, or having begun endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense."

"In all cases of homicide excusable by self-defense, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice; and from the doctrine which has been above laid down, it appears that the law requires, that the person who kills another in his own defense should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood (1 Russell on Crimes, 3rd American Ed., pp. 506-515).

## JUSTIFIABLE HOMICIDE.

In Section 3, Subject—Justifiable Homicide, page 516-521, 1 Russell on Crimes, 3rd American Ed.:

"It has been clearly stated that justifiable homicide is of several kinds, as it may be occasioned by the performance of acts of unavoidable necessity, or by acts done by the performance of the law." P. 516.

"A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony upon either In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable."

"And the rule clearly extends only to cases of felony, for if one comes to beat another, or to take

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his goods merely as a trespasser though the owner may justify the beating of him, so far as to make him desist, yet if he kills him, it is man-slaughter. But if a house be broken open, though in the day-time, with a felonious intent, it will be within the rule."

* * * * * *

"The rule in the case of justifiable self-defense, according to Foster (see Fost. C. L. 273), does not require retreat by a party feloniously assaulted. The author says:

"In the case of justifiable self-defense the injured party may repel force by force in defense of his person, habitation, or property against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. **In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable.**"

Lord Coke (3 Institutes, page 55), speaking of a case of a common assault of A upon B in a mutual combat, says:

"If in the course of such fighting together A giveth back until he commeth to a hedge, wall, or other strait beyond which he can not pass, and then, in his own defense and for safeguard of his own life, killeth the other; this is voluntary, and yet no felony, and the jury that finds that was se defendendo, ought to find the special matter. And yet such a precious regard the law hath of the life of man, that the case be inevitable, that at the common law, he should have suffered death, and, though the statute of Gloucester save his life, yet he shall forfeit all his goods and chattels."

The author then makes the same distinction in regard to retreat in justifiable self-defense contended for by petitioner herein, saying:

"Some, without giving back to a wall, etc., or other inevitable case, as if a thief offer to rob or murder B either abroad or in his house, and thereupon assault him, **and B defends himself without giving back**, and in defense killeth the thief, this is no felony." Cokes 3 Institutes, p. 56.

"Regularly it is necessary that the person that kills another in his own defense fly as far as he may to avoid the violence of the assault before he turn upon his assailant * * * * * but this has some exceptions.

"One in respect of the person killing, second in respect to the person killed. If a thief assaults a true man, either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill his assailant, and it is not felony." Hales Pleas of the Crown Chap. 40.

It must be noted, as said by Mr. Russell in his work with respect to the statute of Henry 8, Chap. 5, that this illustration of the principle is not exclusive of other instances of justifiable homicide, but rather illustrative of the fact that where a felonious assault is made abroad upon B with the intent of murdering him, not solely for the purpose of theft, but out of any wanton malice aforethought, B's right to stand his ground and kill his assailant was conferred by the law, and such killing was not felony, and the slayer forfeited nothing.

In Foster's Crown cases, C. 8, p. 273 et seq., published in 1762, the rule is thus stated:

"The writers on the common law, who, I think, have not treated the subject of self-defense with due precision, do not, in terms, make the distinction I am aiming at; **yet all agree that there are cases in which the man may, without retreating, oppose force to force, even to the death. This I call justifiable self-defense. They, justifiable homicide.** They likewise agree that there are cases in which the defendant can not avail himself of the plea of self-defense without showing that he retreated as far as he could with safety, and then, merely for the preservation of his own life, killed the assailant. **This I call self-defense, culpable,** but, through the benignity of the law, excusable. In the case of justifiable self-defense, the injured party may repel force with force in defense of his person, that habitation or property against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony upon either. **In these cases he is not obliged to**

> retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable."

Mr. East, in his Treaties on the Pleas of the Crown, (published in 1803), at page 271, says, in speaking of homicide from necessity, makes the clear distinction in terms:

> "Herein may be considered, 1—What sort of attack it is lawful and justifiable to resist, even by the death of the assailant, and where the party is without blame. 2—Where such killing is only excusable, or even culpable, and the party is not free from blame," etc.

In relation to the first sort, the author says:

> "1: A man may repel force with force, in defense of his person, habitation or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. **In these cases he is not obliged to retreat,** but may pursue his adversary until he has secured himself from all danger, and if he kills him in so doing, it is called justifiable self-defense."

In Hawkin's Pleas of the Crown, 7 Ed. Vol. 1, the author in speaking of justifiable homicide, at page 172, says:

> "Of justifiable homicide of a private nature, in the just defense of a man's person, house or goods, I shall show, first, in what cases the killing of a wrong-doer may be justified by reason of such defense. Secondly, where the killing of an innocent person may be so justified.
>
> "Sec. 21. And first, the killing of a wrong-doer, in the making of such defense, may be justified in many cases, as where a man kills one who assaults him in the highway to rob or murder him; or the owner of a house, or any of his servants or lodgers, etc., kill one who attempts to burn it, or to commit in it murder, robbery or other felony (a): or a woman kills one who attempts to ravish her (1) or a servant coming suddenly and finding his master robbed and slain, falls upon the murderer immediately and kills him; for he does it in the height of his surprise, and under just apprehension of the like attempt upon himself; but

in other circumstances he could not have justified the killing of such an one, but ought to have apprehended him, &c.

"Sec. 24: And I can see no reason why a person who without provocation is assaulted by another in any place whatsoever, in such a manner as plainly shows an intent to murder him, as by discharging a pistol, or pushing him with a drawn sword, etc., may not justify killing such an assailant, as much as if he had attempted to rob him; for is not he who attempts to murder more injurious than he who barely attempts to rob me? And can it be more justifiable to fight for my goods than for my life? And it is not only highly agreeable to reason that a man in such circumstances may lawfully kill another, **but it seems also to be confirmed by the general tenor of our law books**; which, speaking of homicide se defendendo, suppose it is done in some quarrel or affray. From whence it seems reasonable to conclude, that where the law judges a man guilty of homicide se defendendo there must be some precedent quarrel in which both parties always are, or at least may justly be supposed to have been, in some fault, so that the necessity to which a man is at length reduced to kill another, is in some measure presumed to have been owing to himself; for it cannot be imagined that the law, which is founded on the highest reason will adjudge a man to forfeit all his goods, and put him to the necessity of purchasing his pardon, without some appearance of a fault. And though it may be said that there is none in chance medley, and yet that the party's goods are also forfeited by that, I answer, that chance medley may be intended to proceed from some negligence, or at least want of sufficient caution in the party who is so unfortunate as to commit it, so that he doth not seem to be altogether faultless. Besides, one of the reasons given in our law books for which homicide se defendendo forfeits goods, is because thereby a true man is killed; but it seems absurd, that he who apparently attempts to murder another, which is the most henious of all felonies, should be esteemed such, when those who attempt other felonies, which seem to be much less criminal, are allowed to be killed as downright villians, not deserving the protection or regard of the law."

"And by 24 Hen 8, c. 5 it is recited, 'forasmuch as it hath been in question and ambiguity, that if any evil-disposed person or persons do attempt feloniously to rob or murder any person or persons in or nigh any common highway, eartway, horseway, or footway, or in their mansions, messuages, or dwelling places; or that feloniously do attempt to break open any dwelling house in the nighttime; should happen, in the prosecution of such felonious intent, to be slain by him or them whom the said evil-doers should so attempt to rob or murder, or by any person or persons being in their dwelling house, which the same evil-doers should so attempt burglarily to break by night, if the said person so happening in such cases to slay the offender so attempting to commit murder or burglarly should forfeit or lose his goods or chattels for the same, as any other person should do that by chance medley should happen to kill another in his or their defense." For the declaration of which ambiguity and doubt it is enacted, 'That whoever shall be indicted or appealed of or for the death of such evil-disposed person or persons attempting to murder, rob, or burglarily to break mansion houses as aforesaid, shall not forfeit any lands, tenements goods or chattels, but shall be thereof, and for the same, fully acquitted and discharged."

Bishop, at Section 850, in his New Criminal Law (1892) distinguishes the case where retreat to the wall is required, saying:

"3: Retreating 'to the wall'—These cases of mere assault, and cases of mutual quarrel, where the attacking party has not the purpose of murder in his heart, are **those to which is applied the doctrine of the books that one cannot justify the killing of another, though apparently in self-defense, unless he retreated 'to the wall,' or other interposing obstacle before resorting to this extreme right. But——**

"4: **Murder Meant—Deadly Weapon. Where an attack is made with murderous intent, there being a sufficient overt act, the person attacked is under no duty to fly; he may stand his ground, and if need be kill his adversary. And it is the same where the attack is with a deadly weapon; for in this case the person attacked may well as-**

sume that the other intends murder, whether he does in fact or not."

Under paragraph Three the author cites Hale's P. C. 479, 481; 4 Bl. Com. 185; under paragraph four, 3 Coke's Institute, 55-56; Foster, 273; 1 East P. C., 271.

At Section 951, Mr. Bishop declares that not only does one have the right to resist a murderous assault, but it is his duty to do so, and if he flies, he commits substantially the offense of misprision of felony.

> "2: **Law of Misprision**—When one witnesses an attempt to commit a felony, the duty comes to him immediately to resist it; insomuch that as we have seen, if he merely declines this duty, he is guilty of an indictable misdemeanor, called misprision of felony. Therefore if a man murderously attacked by another flies instead of resisting, **he commits substantially this offense of misprision of felony; even though we should admit that in strict law he will be excused because acting from the commendable motive of saving life.** While, on the other hand, if he flies from one intending merely a battery, he is in no way amenable either to the letter or spirit of a broken law."

Out of this duty to resist a felony arose the doctrine that one had the right to stand his ground against a murderous assault according to many authorities.

From the foregoing it would seem that the early law writers on the subject are all in accord. We will now consider the decisions of this court.

In the case of Beard vs. United States, 158 U. S. 550, the Supreme Court in effect declared that the rule contended for herein was correct, and that the defendant did not have to retreat, when assaulted feloniously. This is apparent from the reasoning of the court throughout the decision.

In that case this court reviewed both the theory of retreat and of standing ground, and discussed at length and approved

the Erwin case, 29th Ohio State, 186, in which the Supreme Court of Ohio reversed the judgment of the trial court, because it charged that it was the duty of the defendant to retreat. In the course of his opinion Justice Harlan said:

> "Upon a full review of the authorities and looking to the principles of the common law, as expounded by writers and courts of high authority, the Supreme Court of Ohio held (Erwin vs. State, 29 Ohio State, 186) that the charge was erroneous, saying: 'It is true that all authorities agree that the taking of life in defense of one's person cannot be either justified, or excused, except on the ground of necessity; and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself. The question then is simply this: **Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself on the ground that he failed to fly from his assailant when he might safely have done so?** The law, out of tenderness for human life and the frailities of human nature, will not permit the taking of it to repel a mere trespass; or even to save life where the assault is provoked; **but a true man who is without fault is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm.** Now, under the charge below, notwithstanding the defendant may have been without fault, and so assaulted, with the necessity of taking life to save his own upon him; still the jury could not have acquitted if they found he failed to do all in his power otherwise to save his own life, or prevent the intended harm, as retreating as far as he could, etc. **In this case we think the law was not correctly stated.**" 158 U. S., pp. 557,560.

Justice Harlan in the same case quoted approvingly the following passage from Runyan vs. State, 57 Ind. 80, 83, 26 Am. Rep. 52:

> "A very brief examination of the American authorities make it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in

> repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defense. The weight of modern authority, in our judgment, establishes the doctrine that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant, is killed, he is justifiable. . . . . It seems to us that the real question in the case, when it was given to the jury, was whether the defendant, under all the circumstances, was justified in the use of a deadly weapon in repelling the assault of the deceased. We mean by this, did the defendant have reason to believe, and did he in fact believe, that what he did was necessary for the safety of his own life or to protect him from great bodily harm. On that question the law is simple and easy of solution, as has been already seen from the authorities cited above.

The earliest expression we have on the question of retreat is in charge given by Associate Justice Bushrod Washington, while on circuit in a capital case in 1790. United States vs. Wiltberger, Case No. 16,938, 28 Federal Cases, p. 728, 3 Wash. C. C. 505.

Mr. Justice Washington's charge on the issue of self-defense was:

> "As to this, the law is, that a man may oppose force to force, in defense of his person, his family, or property, against one who manifestly endeavors, by surprise, or violence, to commit, a felony, as murder, robbery, or the like. In this definition of justifiable homicide, the following particulars are to be attended to," etc.

A comparison of this charge with the language at page 273 of Foster's Crown Cases, shows that Mr. Justice Washing-

ten took his charge from Foster's statement of the law, which is as follows:

> "In the case of justifiable self-defense the injured party may repel force by force in defense of his person, habitation or property against one who manifestly intendeth and endeavorth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happenth to kill, such killing is justifiable."

It is substantially the same as the declaration by Mr. East on the law of the subject in his Pleas of the Crown at page 271, stating the rule to be as follows:

> "A man may repel force by force, in defense of his person, habitation or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kills him in so doing, it is called justifiable self-defense."

Mr. Justice Field in the case of United States vs. Outerbridge, 5 SAWY, 620, 27 Federal Cases, No. 15,978, again states the same rule, (note that it is identical with the language used by East, supra.), and quotes the Wiltberger case in support, thereof, saying:

> "Now upon this subject of justification the law is explicit. A man may repel force by force in the defense of his person, his family or property, against any one who manifestly endeavors by violence or surprise to commit a felony, as murder, robbery, or the like. The right to oppose force to force in such case is founded upon the law of nature, and is not and can not be superseded by the law of society."

In this case petitioner was denied the right to repel force with force, but was required to retreat before an unlawful attack.

Mr. Wharton says:

> "A man may repel force by force in defense of his person, habitation, or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on either. In such a case he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and, if in a conflict between them, he happens to kill, such killing is justifiable. The right of self-defense in cases of this kind is founded on the law of nature; and is not, nor can it be superseded by any law of society. * * * * * The right extends to the protection of the person from great bodily harm." Sec. 1019 (2 Wharton's Crim. Law).

Section 485, Wharton on Homicide, cited in the Allen case by Mr. Justice Brown, 164 U. S., pp. 492-497, and cited by the Circuit Court of Appeals herein has no application since it is an express statement of the rule "**in a case of personal conflict, where the defendant seeks to defend on the ground of excusable, (not justifiable) homicide.**" To ascertain Wharton's views on the subject in the latter case, resort should be had to Section 1019 quoted from his work in the Runyan case, and approved by this Court in the Beard case. Under the facts in the Allen case, as shown by the dissenting opinion by Judge Brewer in the first report of the case (150 U. S.) the only issue made by the defendant was whether his offense was manslaughter rather than murder. There was no issue of justifiable homicide, hence the quotation of Justice Brown from Wharton must be confined in its application to the particular case of personal conflict and excusable homicide, in which, as shown in Russell on Crimes, quoted in the brief at length, there was always the duty to retreat.

In the Rowe case, 164 U. S., p. 546, the facts were that—

The defendant was in the office at a hotel in the Cherokee nation. An altercation arose between him and the deceased, in which the defendant struck the deceased. Thereafter the

defendant's conduct indicated his purpose to withdraw from the conflict. The deceased afterward assaulted the defendant with a knife, under such circumstances as to lead him to the belief that he was in danger of death or serious bodily injury. Without retreating the defendant shot and killed the deceased. The trial court charged that it was the duty of the deceased to retreat. The Supreme Court held this error, saying:

> "If the accused did, in fact, withdraw from the combat, and intended so to do, and if his conduct should have been reasonably so interpreted by the deceased, then the assault of the latter with a deadly weapon, with the intent to take the life of the accused, or to do him great bodily harm, entitled the latter **to the benefit of the principle** announced in Beard vs. United States, 158 U. S. 550, 564 (39; 1086, 1092) in which case it was said: 'The defendant was where he had the right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, **he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.**"
>
> "The accused was where he had the right to be, and the law did not require him to step aside when his assailant was rapidly advancing upon him with a deadly weapon. The danger in which the accused was, or believed himself to be, at the moment he fired, is to some extent indicated by the fact, proved by the Government, that immediately after he disabled his assailant (who had two knives upon his person), he said that he, the accused, was himself mortally wounded and wished a physician to be called. The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary or what he had reason-

> able grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm. And under the circumstances, it was error, to make the case depend in whole or in part upon the inquiry whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant without more seriously wounding him."

It will be noted herein, that Justice Brown, who wrote the opinion in the *Allen* case, dissented in the *Rowe* case, where the Supreme Court made the right of the defendant to stand his ground depend entirely upon the principle that he had a right to resist a felonious attack without retreating. It is likely that Judge Brown was an adherent of the view that the early common law required retreat in justifiable homicide. The majority disagreed with him. In other words, it is reasonable to interpret that the majority of the court in the opinion written by Judge Harlan, who wrote the opinion in the Beard case, refused to hold that there was the same obligation to retreat in justifiable self-defense that there was in excusable self-defense, hence Judge Brown's dissent.

We will call attention to some State cases upholding these views and based on a determination of what the early common law was.

In the ase of Carpenter vs. State, 36 S. W., p. 905, it is said that the common law was enacted as the statutory law on homicide in Arkansas.

Sectio 1670 thereof defines justifiable homicide as follows:

> "Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony."

Section 1672 declares that an attempt to commit murder,

rape, robbery, burglary, or any other aggravated felony, although not herein specifically named, upon either the person or property of any person shall be justification of homicide.

Section 1676 refers to excusable homicide **se et sua defendendo.**

> "In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given."

This was made clear by the court in its discussion of these sections, saying:

> "These statutes, as far as they extend, are a re-enactment of the common law. They make homicide in self-defense excusable, and justify those committed by the slayer in defense of 'person, habitation or property, against one who manifestly intends and endeavors by violence or surprise, to commit a known felony, such as murder, robbery, arson, burglary, and the like, upon either, as at common law. As construed by this court, they uphold, protect and enforce the right to slay an assailant in self-defense, to the same extent as it existed at the time of their enactment. To construe them properly, it is necessary to ascertain what the common law upon the same subject was at the time they took effect.
>
> "At common law, and under the statutes of this State, no one, in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter, or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made, or in a mutual combat, is justified or excused in taking the life of the assailant, unless he is endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing. He

cannot provoke an attack, bring on the combat, and then slay his assailant, and claim exemption from the consequences of killing his adversary, on the ground of self-defense. He cannot invite or voluntarily bring upon himself an attack, with the view of resisting it, and, when he has done so, slay his assailant, and then shield himself on the assumption that he was defending himself. He cannot take advantage of a necessity produced by his own unlawful or wrongful act. After having provoked or invited the attack, or brought on the combat, he cannot be excused or justified in killing his assailant for the purpose of saving his own life, or preventing a great bodily injury, until he has, in good faith, withdrawn from the combat, as far as he can, and done all in his power to avoid the danger and avert the necessity of killing. If he has done so, and the other pursues him, and the taking of life becomes necessary to save life or prevent a great bodily injury, he is excusable. Palmore vs. State, 29 Ark. 248; McPherson vs. State, 29 Ark. 225; Levells vs. State, 32 Ark. 585; Stanton vs. State, 13 Ark. 317; Dolan vs. State, 40 Ark. 454; Fitzpatrick vs. State, 37 Ark. 238; Duncan vs. State, 49 Ark. 543, 6 S. W. 164; Johnson vs. State, 58 Ark. 57, 23 S. W. 7; Smith vs. State, 59 Ark. 132, 26 S. W. 712.

"But the rule is different **where a man is assaulted with a murderous intent.** He is then under no obligation to retreat, but may stand his ground, and, if need be, kill his adversary."

Continuing, the court said:

"In East's Pleas of the Crown, the author says: 'A man may repel force by force, in defense of his person, habitation, or property against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat but may pursue his adversary until he has secured himself from all danger, and if he killed him in so doing it is called **justifiable self-defense,** as on the other hand, the killing by such felon of any person so lawfully defending himself will be murder.' 1 East, P. C. p. 271, See, to the same effect, 4 Bl. Com., p. 180; Foster's Crown Law, 273; and 1 Bish. New Cr. Law. Sec. 850."

> "According to the common law, it is the duty of every one, seeing any felony attempted, by force to prevent it, if need be, by the extinguishment of the felon's existence. This is a public duty, and the discharge of it is regarded as promotive of justice. Any one who fails to discharge it is guilty of an indictable misdemeanor, called 'misprision of felony.' And, as a result of this doctrine Mr. Bishop says, 'If a man murderously attacked by another flies instead of resisting, he commits, substantially, this offense of misprision of felony even though we should admit that in strict law he will be excused, because acting from the commendable motive of saving life."

1 Bish. New Cr. Law, Sec. 851, 849; Pond vs. People 8 Mich. 150, See also, Bostic vs. State, 94 Ala. 45, 10 South, 602; Weaver vs. State, 53 Am. Rep. 389; Gray vs. Combs, 7 J. J. Marsh, 478; 4 Bl. Comm. 180; 1 Hale, P. C. 480; Clark, Cr. Law, 137; 1 Whart. Cr. Law (10th Ed.) Sec. 495.

Cain's Case, 20 W. Va. 679, contains a clear and concise statement of the common law distinction upon the subject. Therein the court said:

> "Where there is a quarrel between two persons, and both are in fault, and a combat as the result of such quarrel takes place, and death ensues, in order to reduce the offense to killing in self-defense two things must appear from the evidence and the circumstances of the case—First: That before the mortal blow was given the prisoner declined further combat, and retreated as far as he could with safety; and, secondly, that he necessarily killed the deceased in order to preserve his own life, or to protect himself from great bodily harm. When one, without fault himself, is attacked by another in such a manner, or under such circumstances, as to furnish a reasonable grounds for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such decision will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, he may act upon such appearances, and without retreating kill his assailant, if he has reasonable

**grounds to believe, and does believe that such killing is necessary to avoid the apparent danger."**

In State vs. Clark, 41 S. E. 207, a careful consideration of the subject, was given to it by the Supreme Court of Appeals of West Virginia and it declared:

> "Where an attack is made with murderous intent, there being a sufficient overt act, the person attacked is under no duty to fly. He may stand his ground and, if need be, kill his adversary." Bish. Cr. Law, Sec. 850. "It is familiar doctrine that one assaulted with murderous intent may avert the felonious result by taking the aggressor's life. The law of self-defense justifies him, **but justification rests equally in the fact that he is resisting the commission of a felony.**" Bish. Cr. Law, Secs. 849, 866. See also, Whart. Hom. Sec. 533; Manns' Case, 48 W. Va. 480, 37 S. E. 613. So far as point 1 of the syllabus is in conflict with these principles, it is overruled. 'In a case of simple assault, not made with the intent to kill or do other great bodily harm, where the person assailed is not deceived as to its character, so as to be within the rules regarding mistake of fact; in other words, where the intent of the assailant is not to commit a felony, but a misdemeanor, this right of perfect defense does not exist. The assailed person is not permitted to stand and kill his adversary if there is a way of escape open to him, while yet he may repel force by force, and, within limits differing with the facts of cases, give back blow for blow. The rule, to which the exceptions are not numerous, appears pretty distinctly to be that the law does not justify one in killing another simply to prevent his committing a misdemeanor. **These cases of mere assault, and cases of mutual quarrel, (the Allen case for instance) where the attacking party** has not the purpose of murder in his heart, are those to which is applied the doctrine of the books, that one cannot justify the killing of an other, though apparently in self-defense, unless he retreated "to the wall," or other interposing obstacle, before resorting to this extreme right.' Bish. Cr. Law, Sec. 850. The only exception to this is where a man is assaulted, without intent to kill, in his own dwelling house. There he need not run or retreat, but he cannot kill his

adversary unless it is necessary to save his own life or prevent another felony. Bish. Cr. Law, Sec. 858; Beard vs. U. S. 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086."

There are many other cases where the principle has been traced which uphold the views here expressed. See Erwin vs. State, 29 Ohio State, Pond vs. People of Mich.

In the State of North Carolina, where the retreat rule is adhered to, there has been strong dissent and forcible declaration of what the common law was upon the subject.

In State vs. Gentry, 34 S. E., p. 706, Montgomery, J., dissenting, the court said:

"In Fost. Crown Law, p. 273, it is written: 'The writers on the Crown Law, who, I think, have not treated the subject of self-defense with due precision, do not, in terms, make the distinction I am aiming at, **yet all agree** that there are cases in which a man may, without retreating, oppose force by force, even to the death. This I call justifiable self-defense, they justifiable homicide. In the case of justifiable self-defense, the injured party may repel force with force, in defense of his person, habitation, or property, against one who manifestly intendeth, and endeavoreth, with violence or surprise, to commit a known felony on either. **In these cases he is not obliged to retreat,** but may pursue his adversary till he findeth himself out of danger, and, if in a conflict between them he happeneth to kill, such killing is justifiable. The right of self-defense in these cases is founded on the law of nature, and is not, nor can be, suspended by any law of society."

"A distinction which seems reasonable, and is supported by authority, is taken between assaults with felonious intent and assaults without felonious intent. In the latter case, the person assaulted may not stand his ground and kill his adversary, if there is any way of escape open to him, though he is allowed to repel force by force; in the former, where the attack is made with murderous intent, the person attacked is under no obligation to flee. He may stand his ground, and kill his adversary, if need be.' Id. Sec. 633, and cases there cited. And so Mr. East states the law to

be:——'A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, burglary, robbery, and the like upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and, if he kills him in so doing, it is called justifiable self-defense.' 1 East. P. C. 271; 2 Bish. Cr. Law, Sec. 633. The American doctrine is to the same effect: 'If the person assaulted, being himself faultless, reasonably apprehends death or great bodily harm to himself unless he kill the assailant, the killing is justifiable.'' Id. Sec. 644. 'The attempt to commit a felony upon the person may be resisted to the death without flying or avoiding combat.' Id. Sec. 652.''

**Another View.**

In this case Brown was a contractor, employee or servant of the Government, in the performance of his business, and engaged in carrying out a contract with his employer, owner of the tract of land upon which the assault occurred. He was at what may be termed his place of business, or at his master's place of business. He had been for days at the place engaged in superintending the loading and removal of the dirt by his teamsters.

It has never been held that a man must retreat from his place of business when feloniously assaulted, on the contrary he may stand his ground. It is also uniformly held that a servant or employer has the same right as the owner. If Brown had owned the lot he would not have been obliged to retreat. He was at the place of his business or his master's business. We submit that this gave him the right to stand his ground.

Even in the States which adhere to the view of the necessity to retreat, it is uniformly held that one who is attacked

by another in his place of business, in such manner as would cause a person to believe that he is in immediate danger of death or serious bodily harm, is not obligated to retreat, but would be justified in taking the life of his assailaint. See Andrews vs. State, 159 Ala., 14; 48 Southern 858; Carey vs. State 76 Ala. 78; State vs. Goodager, 56 Ore., 198; 106 Pac. 38; Rehearing denied, 108 Pac. 185.

In the case of Haines vs. State, 17 Georgia, 46, a person entitled to joint use of a well, went there to draw water for his family. While there he was attacked. It was held by the Supreme Court of Georgia, that he was not required to retreat, but might kill his assailant, if necessary, to protect himself from death or serious bodily injury.

This right to stand ground applies also to a servant or employee of the owner of the premises in the states where the strict rule of duty to retreat is enforced. See Suell vs. Derricott, Ala., 49 Southern, p. 895.

**Defense of the Castle.**

The right to defend one's home, even to the point of slaying one who forcibly intruded therein, or who assaulted the owner therein, does not seem to have depended at the common law entirely on the fact that the slayer was assaulted feloniously, that is with an intent to kill him. See Section 858 Bishop's New Cr. Law. There it is stated:

> "Sec. 858: Defense of the Castle—In the early times, our forefathers were compelled to protect themselves in their habitations by converting them into holds of defense; and so the dwelling house was called a castle. To this condition of things the law has conformed, resulting in the familiar doctrine that while a man keeps the doors of his house closed, no other may break and enter it, except in particular circumstances to make an arrest or the like—cases not within

> the line of our present expositions. From this doctrine is derived another; namely, that the persons within the house may exercise all needful force to keep aggressors out, even to the taking of life. As observed by Campbell, Jr., in Michigan, a man is not obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life.' And in Missouri a man's business office was held to be his dwelling within this rule."

In support of this text, the author quotes 1 Hale's P. C. 458, declaring:

> "A bailiff, having a warrant to arrest Cook upon a capias ad satisfaciendum, came to Cook's house and gave him notice; Cook menaceth to shoot him if he depart not, yet the bailiff departs not, but breaks open the window to make the arrest; Cook shoots him, and kills him; it was ruled: (1): That it is not murder because he cannot break the house, otherwise it had been if it had been upon an habere facias possessionem. (2): But it was manslaughter, because he knew him to be a bailiff. But, (3): Had he not known him to be a bailiff, or one that came upon that business, it had been no felony, because done in defense of his house. S. C. Cook's Case, Cro. Car. 537."

It would seem from the number of cases cited under this text that this doctrine was thoroughly, and well-established.

In the leading case of Aldrich vs. Wright, 16 American Reports at page 341 (53 N. H. 398), the Supreme Court of New Hampshire describes the common law theory of self-defense as being the same as that of the natural law recognized by the Bill of Rights, saying:

> "Higher and earlier in its origin than the constitution of the common law, not superceded by those temporal and finite systems, but sustained and enforced by the declaration and sanction of the highest, primary, eternal and infinite law of nature (3 Bl. Com. 4; 1 Hale's P. C. (Am. ed. of 1847) 479, note 1, the right of defense cannot be

prescribed within the limits of a narrow technical rule. It is an original and comprehensive prerogative, necessarily ascertained and defined by natural reason. It is not established by any fallible authority, nor measured by any precedent, nor restricted by any arbitrary dogma. Long upheld by the common law, it has, under the administration of that law, theoretically been what it was before; and now, reinforced by a constitutional guaranty, it is what it has always been. The authorities of the common law show what it has been held to be by men whose opinions are entitled to great consideration. If any discrepancy should be found in the definitions of it, given by common law precedent and by natural reason, the latter must prevail, because the right is explicitly asserted in the bill of rights as a natural right, and not as one defined by common law authorities. But between the natural right and its common law definition rightly understood there is no variance that concerns the present inquiry."

* * * * * *

At page 360 the New Hampshire court declares that this common law doctrine of self-defense is:

"The authorities are, that a man may oppose a deadly resistance to a felonious attack, but not to a mere trespass (a trespass against a man's castle being sometimes excepted 3 Greenl. Ev. Sec. 117; East's P. C., ch. 5, Sec. 56; Com. vs. Drew, 4 Mass. 391; 396; Rose Cr. E. 770; 1 Bishop's Cr. L. Sec. 858, 5 ed. A man, in defense of his possession of land or goods, 'may justify an assault and battery; but he cannot justify either mayheming or wounding, or mannas of life and members, and so note a diversity between the defense of his person and the defense of his possession or goods. 2 Inst. 316. Where the trespass is barely against property, 'the law does not admit the force of the provocation sufficient to warrant the owner in making use of any deadly or dangerous weapon.' 1 East's P. C., ch. 5, Sec. 56. But a man, upon whom or whose property another manifestly intends to commit a known felony by violence or surprise, **is not obliged to retreat**; on the contrary he may pursue his adversary, and kill him if necessary to prevent the felony. 1 East's P. C., ch. 5, Secs. 44, 45; 3

Greenl. Ev., Sec. 115; 4 Bl. Com. 180; Fost. Cr. L. 274.

"Where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting;' but 'the law of England' will not 'suffer with impunity any crime to be prevented by death unless the same, if committed, would also be punished by death.' 4 Bl. Com. 181, 182; 1 Bishop's Cr. L. Sec. 849, 5th Ed. The rule generally laid down is, that a deadly resistance is lawful only against an apparent, forcible felony."

NOTE—At the common law an assault to commit a known felony was punishable by death. Id.

The books are full of the authorities sustaining the contention here urged. We have endeavored, however, to confine our citations to a few of the leading cases lest our argument be too long.

In view of the foregoing array of authorities, as to what the early common law is; in view of the express declaration of approval in the Beard case by the Supreme Court of the principle upon which they rest; in view of the subsequent recognition, and strong reiteration of the common law doctrine, as a principle, in the Rowe case by the same court; in view of the absence of any Federal statute defining a failure to retreat as an element of the offense of murder, in view of the necessity therefore of resort to the common law to ascertain whether or not this duty existed, we submit, with all due respect and deference, that this court should hold that the Trial Court erred in charging and the Circuit Court of Appeals in affirming that the duty was imposed upon the defendant to retreat before he could resist an assault which, viewed from his standpoint, was calculated to inflict upon him death or some serious bodily injury.

## THE RULE OF "RIGHT TO STAND GROUND" IS THE RULE OF REASON.

It seems to us that the rule contended for by petitioner is in accord with reason. The principal thought that must control the mind of any one who is assaulted by another with apparent murderous intent is the necessity of saving his own life, and not whether he is on one side or the other of a boundary line whose exact location may not be known to him. It would make very little difference to the assaulted party, whether he was killed on his own or another's land. Intent is always the controlling element in determining the culpability of a defendant for the commission of a given act. If this be true, can it be truly said that a man's intent in resisting an unlawful deadly assault with the necessary force is criminal or not, depending upon whether he was upon one side or the other of an imaginary boundary line enclosing his premises? It seems to us that an arbitrary rule, making the motive which controlled one in killing his assailant, viz—the necessity of saving his own life, lawful on one side of a boundary line, and the same motive inducing the same act, prompted by the same laws of nature, without consciousness at the moment of location or boundaries, wrong, unlawful, and felonious, when committed upon the other side of the line, is not in accord with reason or justice.

If two men, who are tenants in common in a tract of land, are standing beyond the boundary thereof, one six feet, and the other four feet beyond the same boundary, be both attacked at the same time from the same direction by two different assailants unlawfully, and both put in fear of their lives, and both should retreat five feet from the point at which they were assaulted, and then stand their ground, and each kill his assailant, and in each instance there was opportunity for

further retreat, could it be said that there was any difference in the justification, because one was one foot within, and the other one foot without the line? Or say for instance that A and B own adjoining tracts, and that near the common boundary line both are on the land of B and they are unlawfully assailed by two persons endeavoring to kill them, and each, in an effort to save himself, controlled by the dominant motive existing in every man's mind of self-preservation, slays his adversary without retreating; say at the time neither A nor B knew on which side of the line he was, could it be said, with any degree of respect for the principles of the reason, the logic and the justice of the law, that one was guilty and the other not? If neither retreated, and each was controlled by the same motive of self preservation, could there be any arbitrary duty upon A to retreat, and on B no such duty be imposed? Would A be found guilty of murder and B discharged.

Again, supposing that A and B are assaulted feloniously by C and D on a tract of land, the title to which, is yet undetermined, but claimed by both A and B. A and B believing their lives are in peril slay their assailants, without retreating and without stopping to consider in whom the title or ownership of the land is vested. In such case, according to the rule laid down by the Circuit Court of Appeals, the guilt of one and the innocence of the other should be determined by a civil action in ejectment, or trespass to try title, for its decision makes guilt or innocence depend entirely on the arbitrary question of title. This seems an absurd conclusion, yet it logically follows if the right to defend one's self against a murderous assault is made to depend on whether or not the party assaulted has title to the premises on which the assault occurred.

We submit that the rule announced by the early common law writers and recognized by this court in the Beard and Rowe cases, supra, is in accord with reason, and the principle announced at the civil law that "right need never yield to wrong."

## THIRD POINT

THE CIRCUIT COURT OF APPEALS ERRED IN NOT HOLDING THAT THE DISTRICT COURT ERRED IN FAILING TO SUBMIT TO THE JURY THE ISSUES OF ASSAULT WITH INTENT TO MURDER AND AGGRAVATED ASSAULT, AND IN REFUSING PETITIONER'S REQUESTED INSTRUCTION NO. 14 ON SUCH ISSUES.

### ARGUMENT.

It was the theory of the defendant, and there was evidence supporting it, that the third shot inflicted the mortal wound, and was fired in self-defense, and that the fourth shot inflicted only a superficial wound, which would not have caused death, and was fired accidentally.

It was the theory of the Government that the fourth shot inflicted the mortal wound, and was fired under such circumstances that if death resulted therefrom defendant was guilty of some phase of homicide.

See evidence quoted in full in statement, supra.

Under these circumstances it was incumbent on the court to charge that if the fourth shot was fired with intent to kill, but did not inflict the fatal wound, but the fatal wound was inflicted by the third shot, and that defendant, was justified in firing such third shot in his necessary self-defense, then defendant could only be convicted of assault with intent to murder, or aggravated assault dependent on whether the

fourth shot was fired under such circumstances that if death had resulted therefrom the homicide would have been murder or manslaughter. It was fundamental error not to submit every issue made by the evidence. The court's attention was called to the failure to submit this by requested instruction No. 14, which was refused, to which action of the court the defendant excepted. (Trans. p. 25..).

**FOURTH POINT**

**The judgment below should be reversed.**

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# In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ROBERT B. BROWN, PETITIONER,
v.
THE UNITED STATES.
No. 364.

*ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

## BRIEF ON BEHALF OF THE UNITED STATES.

### STATEMENT OF CASE.

The petitioner was convicted and sentenced in the United States District Court for the Southern District of Texas for murder in the second degree committed at a place within the exclusive jurisdiction of the United States, viz, at the site of the post office building in Beeville, Tex. On writ of error from the Court of Appeals for the Fifth Circuit the judgment was affirmed, the court rendering an opinion which carefully considered all the errors assigned, and to which we refer (R. 205–213; 257 Fed. 46). The present writ of certiorari was then applied for and granted.

## ARGUMENT.

### I.

### THE INDICTMENT.

The indictment (R. 4–6) alleged that prior to the date of the homicide the United States acquired in the town of Beeville, Tex., a tract of land "for the public purpose of the United States." The description of the land was given at length by metes and bounds. It was alleged that prior to the homicide exclusive jurisdiction over the land was ceded to the United States by the State of Texas, and that such exclusive jurisdiction still obtained.

The petitioner moved to quash the indictment because it "charged no offense against the laws of the United States" (R. 9, 10). He also moved in arrest of judgment, on what grounds does not appear (R. 11, 12). He now claims that the indictment was fatally defective because it did not allege that the land was acquired for the erection of a fort, etc., "or other needful building."

The Court of Appeals held (a) that the defect, if any, was cured by section 1025, R. S.; (b) that a description of the property, by metes and bounds, was sufficient, the court being bound to take judicial notice of the fact that it was the site of the post office at Beeville; (c) that, since under the statutes of Texas the governor was authorized to cede jurisdiction for post offices, and had made a cession, it would be presumed that he had acted in accordance with the statutory authority (R. 207–209;

257 Fed., 48–51). As we can add nothing to the reasoning of the Court of Appeals on these points, we refer to and rely upon it and the authorities cited in the opinion.

In addition, attention is called to the amendment of section 269, Judicial Code, by the act of February 26, 1919, ch. 48, 40 Stat., 1181, which amendment reads as follows:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

The statute is clear, mandatory in its terms, and highly remedial. It should be applied in every case falling within its broad purpose so as to cure, as far as possible, the evil aimed at.

There is, of course, no question that a post office is "a needful building" within the meaning of the Constitution and of section 272, Criminal Code (*Battle* v. *United States*, 209 U. S. 36). The first witness called in the case at bar—Fenner, the surveyor—testified that the homicide occurred on the post-office site (R. 68 *et seq.*). Thereafter the trial proceeded without question on this basis. This court will not now listen to a suggestion that the proceedings should all be held for naught because the indictment did not in terms allege what everybody knew.

## II.

### THE REFUSAL TO TRY THE CASE IN BEE COUNTY.

This, while assigned as error and argued in the Court of Appeals, is not discussed in the brief in this court. We mention it out of abundant caution, but are satisfied to rely on the opinion of the Court of Appeals to the effect that the District Court for the Southern District of Texas never lost jurisdiction of the cause by the original transfer of the trial to Bee County, and that the trial judge had not abused the discretion conferred on him by section 40, Judicial Code, by refusing to transfer to Bee County the trial on the substituted indictment (R. 206, 207; 257 Fed. 47, 48).

## III.

### THE CHARGE AND THE REFUSAL TO CHARGE ON THE QUESTION OF THE DUTY TO RETREAT FROM A MURDEROUS ASSAULT.

The petitioner and the slain man—Hermis—had for some 10 years or more (R. 98) lived in Beeville, a town of about 2,000 inhabitants (R. 118). They were each engaged in the hauling business in competition (R. 117, 118). It may be presumed that competition for this business in a small town would engender more or less personal friction. There had been hard feeling between them. We have not Hermis's side of the story, but it would be contrary to human experience to suppose that all the blame was his. Hermis had made threats against petitioner on various occasions, and some of these had been reported to Brown. The latter testified to two assaults upon

him by Hermis, both with a knife.[1] The first was at the depot some 8 or 8½ years prior to the homicide (R. 131). The second was in a saloon in September or October, 1915 (R. 116). The negro, Archer, testified to threats some two months before the homicide, which, however, he communicated, not to Brown, for whom he was working, but to Ruebush (R. 102). Thornton testified to bad blood between the two men (R. 107). Two witnesses and the petitioner himself testified to an assault by Hermis, with a knife, on the petitioner in a saloon in September or October, 1915. (R. 115, 116, 130.) Carvel and Taylor, station agents, testified to bad feeling, and threats by Hermis at the station (R. 117, 118). Perkins, a peace officer, testified to the same general effect, but admits that Hermis had never been in trouble during the 9 years Perkins was such officer (R. 119, 120). Francis and Cheney (R. 120, 121) do not add anything of importance. Ruebush's testimony (R. 110 *et seq.*) does not seem of much weight. He says he communicated certain threats to petitioner.

As to the knife owned or drawn by Hermis on several occasions, as testified to by petitioner's witnesses, Thornton, a peace officer, speaks of "a large one-bladed Barlow" (R. 107), but says of the knives which "were on his person" after his death that one "was an ordinary pocket knife and the other a small knife." (R. 108.) Perkins (R. 119) speaks of

[1] To understand the dates given by the witnesses it should be stated that the homicide was in May, 1917, and the trial in January, 1918.

"a small pocket knife;" Francis (R. 120), of a Barlow knife of "an average size" (R. 121). The petitioner testified that the blade of the knife he claims Hermis threatened him with "looked about 3 or 3½ inches long" (R. 128).

Petitioner and Hermis were both engaged in hauling dirt removed from the excavation of the post-office site. Some dispute had arisen between them as to the right of Hermis to remove certain black dirt (See R. 118). Petitioner was a man weighing 175 or 180 pounds, Hermis a smaller man weighing about 155 or 160 pounds (R. 80). The petitioner testified that on the afternoon of the homicide, moved by Hermis' threats, he took to the excavation a 41 caliber sixshooter Colt revolver (R. 127; see also R. 106). He wrapped the gun in a slicker lying on the top of the dump (R. 99, 103). This dump was on the southwest part of the post-office lot, and was some 5 or 7 feet high, and of course slightly more on its western slope (R. 72). Its greatest length seems to have been from north to south, and its width was some 7 or 8 feet. It is impossible, however, to reconcile the various statements of the witnesses as to distances, which is natural when the infirmity of human observation and the length of time between the homicide and the trial are considered. Hermis came up on a wagon driven by his servant Miller to get a load of dirt. He got out on the ground at the rear of the wagon. The petitioner was standing on the dump and, according to his own statement, was some 20 or 25 feet away (R. 131). The petitioner told Miller

he could not remove the dirt from that place. Thereupon Hermis started up the dump. The petitioner, after telling him (according to his own statement) to stop, went over to his slicker, got his gun from it,and shot Hermis four times. At the third shot Hermis fell to the ground, and the fourth shot was fired with Hermis recumbent and the petitioner standing above him. Each shot took effect, one in the left thigh below the groin, another to the left of the breast bone, another two inches above the left nipple, another severing completely the thoracic aorta (a large artery, from the heart), and causing death (R. 88, 89). The distances at which the several shots were fired probably differed as Hermis and the petitioner moved about. After the fourth shot, the petitioner walked away, without expressing regret, making inquiry, or offering assistance (R. 133).

The above (we believe) condenses the undisputed facts. It is now necessary to consider the petitioner's testimony. There are two, and only two, vital points in it, one as to Hermis' assault with an open knife, the other as to the fourth shot being accidental. There were 12 eyewitnesses to the shooting in all or a part of its phases (excluding the petitioner), 7 called by the United States and 5 by the petitioner. All 7 of the Government witnesses testified positively that Hermis did not assault petitioner, and had no knife; and that the fourth shot was deliberately fired. Of the witnesses for the petitioner, all testified similarly as to the fourth shot. Ruebush, a partisan of the petitioner, does say that Brown "had his gun

toward his side and the fourth shot was fired" (R. 112). But this is not the language in which a friend would describe an accidental shot, and it can not be taken to affect the universal agreement of the witnesses on the subject. As to the assault and the knife, the petitioner's witnesses were as follows: Gabeo (R. 102) says nothing on the subject, and, therefore, by a just presumption, saw nothing; Rodriguez (R. 105) states positively that he saw nothing in Hermis' hand and did not see him strike Brown; Ruebush (R. 112) said it looked as though Hermis was striking at petitioner, but he saw no knife, and his description of the affair is inconsistent with Hermis' having one; Stockbridge, related by marriage to petitioner, "thinks" Hermis had a knife because the latter was "reaching," but he admits he did not see anything in his hand although his vision was unobstructed (R. 114, 115); Doughty testified that Hermis was crowding Brown and "striking I thought with a knife from the licks he was making" (R. 98), but admits that he did not see any knife (R. 99). The testimony, therefore, as to the knife (excluding the petitioner) is in effect as unanimous as it is to the volition behind the fourth shot. It must be remembered that Hermis had his coat off and his sleeves rolled up, making it easier to detect a weapon, if he had one, than would ordinarily be the case. As to the fourth shot, the improbability of an accidental shot taking effect when one man is on the ground and the other standing over him increases the

discredit given petitioner's testimony by the other witnesses.

On this state of facts, the question first arises whether any charge as to the law of self-defense was necessary at all, and whether, therefore, the charge as given and complained of by the petitioner may not be disregarded on this writ. The act of February 26, 1919, ch. 48, 40 Stat. 1181, quoted above, seems to apply to such a situation. In *Doremus* v. *United States*, 262 Fed. 849, 853, the Court of Appeals for the Fifth Circuit, after holding that a charge given by the trial court as to imputed knowledge was erroneous, held that the error was of a kind falling within the act of February 26, 1919, *supra*, and could, therefore, be disregarded, because reasonable men could have drawn from the undisputed testimony only the one inference of actual knowledge. So in *Battle* v. *United States*, 209 U. S. 36, 38, Mr. Justice Holmes, delivering the opinion of the court, said:

> There was an exception to a refusal of the court to instruct the jury on the law of justifiable homicide. Sufficient instructions were given. The evidence, however, would not have warranted such a verdict. *According to the defendant's own testimony the death was due to an accident.* According to all the other evidence, even the most favorable, the defendant was upon a platform above Berry, and Berry either was below standing on a beam in a very insecure place, or else was climbing up to or upon the platform, when the defendant struck him over the head, according to several wit-

> nesses, with an iron bolt, until he dropped 50 or 60 feet. *So as to involuntary homicide. There was no evidence of such a case*, and the jury under the charge must have found that the defendant made an intentional and unjustified assault of such a kind that the probable consequences were obvious, an assault with a deadly weapon, that either directly caused Berry's death or brought it about by his inevitable fall. (*Italics ours.*)

If Battle was not entitled to a charge based upon his own testimony that the homicide was involuntary, it is difficult to see why the petitioner was entitled to a charge on self-defense, when the only support to such a theory was his own testimony. No one but the petitioner saw any assault with a deadly weapon. But, waiving even that, no self-defense can possibly be claimed as to the *fourth* shot. This can only be justified as an accident, so that the *Battle Case* directly applies.

The jury could not, having the slightest regard to their oath, have found that this last shot, fired under the circumstances and relative positions disclosed by the testimony, was unintentional.

If this court should, nevertheless, be of opinion that the petitioner was entitled to a charge on the subject of the duty to retreat from an assault with a deadly weapon, it is necessary first to examine what charges were given and refused.

In the first place; we assume that there can be no objection to the charge because it did not state that the test was the apparent, not the actual,

danger. We refer to this because in the tenth paragraph of the charge the *real* danger and necessity were stated as the condition (R. 153). This, however, was immediately corrected by paragraphs 11, 13–B, 13–C, 14, and 15 (R. 153, 154, 155), where it is distinctly stated and repeated that the test is the *reasonable belief* of the assaulted person, and the *apparent* danger of a retreat. The case, therefore, in this aspect, is exactly like *Addington's Case*, 165 U. S. 180, 187, where the later statement in the charge that the apparent danger was the test was held to cure an earlier, more restricted statement.

The main point, however, as to self-defense, and the only one argued by counsel (Brief p. 53–86) is that the Court, in paragraphs 10, 11, 13–B, 13–C, 14, and 15 of the charge, conditioned petitioner's right to stand his ground and kill Hermis by the proviso that to retreat or attempt to do so would have appeared dangerous to a reasonable man. This is brought out clearly by petitioner's exceptions to the charge, paragraphs 4, and 7 (latter part) (R. 159, 160), and by the requests to charge contained in bills of exceptions 16 (R. 160, 161), 18 (R. 162, 163), 20 (R. 164, 165), 21 (R. 165, 166), all of which are based on the proposition that a person assaulted under such circumstances as to induce a reasonable belief that his life is aimed at is, under no circumstances, bound to retreat, but may stand his ground and kill if necessary.

Counsel in their brief argue earnestly and at length that the common law completely justifies

their claim which should therefore be sustained by this Court. They rely largely upon Foster's statement of the law in his Discourse on Homicide contained in his Crown Law, and point to Mr. Justice Harlan's opinion in *Beard* v. *United States*, 158 U. S. 550, 564, which certainly sustains their view. As in our opinion the common law in no way supports the claim of counsel, we proceed to examine it in the light of authority.[2] Such an examination will show (we believe) that the common law never recognized two species of homicide in self-defense, one justifiable and the other excusable; one dispensing with avoidance of, or retreat from an assault with a deadly weapon, the other requiring it; but that, on the contrary, the common law, in every case where public interests, e. g., aid of justice, were not involved, required the assaulted person to avoid homicide, if he could do so without endangering the life of himself or another.

In Bracton (1250), Twiss ed., in Ch. V of Bk. 3, f. 104 b, speaking of the crimes of which the King's courts have jurisdiction, it is said:

> Likewise the crime of homicide, whether it be accidental or intentional, although they do not contain the same punishment, because in one case there is rigour, and in the other mercy.

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[2] The following discussion of the common law up to the time of the publication of Foster's Discourse is mainly based on Pollock & Maitland's History of English Law, Vol. II, pp. 476–481; Stephen, History of Criminal Law, Vol. III, pp. 36–41; Professor Beale on Retreat from a Murderous Assault, 16 Harvard Law Review 567.

At f. 134, in speaking of relief to outlawry, he says:

> The King is also sometimes bound of grace to grant to him (an outlawed person) his life and limbs, as if by misadventure or in self-defense he has slain a man.

At f. 144 b, in speaking of appeals for homicide, he says:

> Likewise if a person has killed a thief in the night, on this condition he shall have impunity, if he could not have spared him with safety to himself, but if he could have done so, it shall be otherwise. For the life and the death of a man are in the King's hand, as before the King at Windsor concerning a certain man of Cocham before William de Ralegh, at that time justiciary, when the lord the King in that case pardoned the death. Likewise if anybody in a case of hamsoken, which is the invasion of a house against the peace of the King, defends himself in his own house, and the invader is killed, he shall remain unpersecuted and unavenged, if he, whom he invaded, could not otherwise defend himself, for it is said that he is not worthy to enjoy peace who is not willing to keep it."

Britton (1290) has nothing to say of justifiable or excusable homicide in Ch. VI, p. 34 *et seq.*, dealing with the subject, but in giving the exception to an appeal of homicide he says (p. 113):

> Or he may say, that although he committed the act, yet he did not do it by felony prepense, but by necessity, in defending

> himself, or his wife, or his house, or his family, or his lord, or his lady, from death; or that he killed the man in defense of our peace, or by some mischance, without any thought of felony; in all which cases, if proved, the appellees shall have judgment of acquittal.

As to the decided cases at this period and later, in 1225 a defendant was acquitted who slew an outlaw, for whom hue and cry was out, in self-defense (Bracton's Note Book No. 1084). To the same effect is *Howel's Case* in 1221 (translated in Kenny's Cases on Criminal Law, p. 139), where a carter slew a robber who attacked him and he was acquitted, but only because the deceased was a robber. (See also Y. B. 30–31, Edw. I, 512 (1302), where killing was in self-defense against a known thief whom defendant was endeavoring to arrest.)

On the other hand, in the case in Bracton's Note Book No. 1215, the defendant in self-defense slew a notorious malefactor in the King's forests. Nevertheless, although he could not avoid the assault except by killing (*quia non poterit aliter evadere manus ejus*), it was necessary to obtain a pardon of the King's grace.[3]

> In a precedent book of Edward I's time a justice is supposed to address the following speech to one whose plea of self-defence has been endorsed by the verdict of a jury: "Thomas, these good folk testify upon their oath to all that you have said. Therefore by

[3] Consequently by statute 21, Edw. I, St. 2 (1293), foresters were not in the future "to be troubled" as to such matters "before the King and his Justices."

> way of judgment we say that what you did was done in self-defence; but we can not deliver you from your imprisonment without the special command of our lord the King; therefore, we will report your condition to the king's court and will procure for you his special grace." (P. & M., Vol. II, 477, 478.)

Precedents of the pardons granted in such cases are given in Pollock and Maitland, Vol. II, p. 478. The procedure is clearly recognized by Stat. 6, Edw. I, Ch. 9 (1278), which provided that thereafter no inquest should be held to inquire whether a homicide was done in self-defense, but the defendant should put himself on the country. If the jury found specially that the killing was done in self-defense, the King would pardon "if it please him." The pardon for homicide in self-defense is again referred to as necessary in an answer of the King in 1310 to certain petitions quoted in Stephen Hist. Cr. Law, Vol. III, p. 38. Also the procedure in such matters is illustrated by certain cases in 1330, and in 1487 translated by Beale, 16 Harv. Law Rev., pp. 570, 571, as follows:

> "Note that when a man is acquitted before the justices errant for death of a man *soy defendendo*, the process is such, that he shall have the writ of the Chief Justice, within which writ shall be contained all the record of his acquittal, to the Chancellor; who shall make him his writ of pardon without speaking to the King by course of law. Such a man is bailable after the acquittal, &c.

"Scrope (C. J.) and Louther, Justices, ordered the prisoner to remove the record into the Chancery; and the Chancellor made him a charter in such a case without speaking to the King."

In 4 Henry VII the report reads:

"In the Chancery it was moved that one was indicted because he killed a man *seipsum defendendo*, &c. And the Chancellor said that the indictment should be removed into the King's Bench, and that he would grant a pardon of common grace unto the party according to their form. And it was suggested by the Sergeants at the bar that there was no need of having any pardon in this case; for here the Justices would not arraign him, but dismiss him, &c.; but if the indictment were for felony, and the party put himself upon the inquest for good and ill according to the Statute of Gloucester, c. 9, then if the inquest found that he did it *se defendendo* the Justices would adjudge him to prison until he had a pardon; but here he should be dismissed, and not lose his goods.

"Fairfax (Justice of the King's Bench), who was in the Chancery, went to his companions, and returned and said, that their custom was to take inquest and inquire whether he did it *se defendendo* or not, and if so found he lost his goods, &c.; and so in either way he should have a pardon by his opinion. And so it seemed to the Chancellor that a charter should be granted.

"Note the opinion of the Justices of the Bench against the Sergeants."

In 1302 (Y. B. 30–31, Edw. I, p. 510) there was a homicide in self-defense in endeavoring to arrest a thief and the defendant, being a clerk, was sent to prison of the Bishop, i. e., was convicted so far as the common law was concerned.

Certain cases decided in 1330 are reported in Fitzherbert's Abridgement, Title Corone Nos. 284, 285, 286, and 287, and are abstracted in Stephen, pp. 38, 39. In the first one the killing was clearly in self-defense, the defendant having retreated to the wall, and yet he was remitted to prison to await the King's pardon. In Fitzherbert, Title Corone No. 305 (1330),

> It was presented that a man killed another in his own house *se defendendo*. It was asked whether the deceased came to have robbed him, for in such a case a man may kill another though it be not in self-defense. *Quod nota*. And the twelve said not. Wherefore they were charged to tell the way how, &c., it happened, whereby he should obtain the King's pardon. (Beale in 16 H. L. R. 569.)

In 1348 it was said (Fitzherbert, Title Corone No. 261, translated 16 H. L. R. 569):

> Where a man justifies the death of another as by warrant to arrest him, and he will not obey him, or that he comes to his house to commit burglary and the like, if the matter be so found the justices let him go quit without the King's pardon; it is otherwise where a man kills another by misfortune, &c.

In 1369 (Lib. Ass. f 274, pl. 31, translated Kenny Cases on Cr. Law, pp. 141, 142) it was held that a chaplain was guilty of homicide who struck with a stick a person assaulting him, and thus killed him because "he might have fled from his assailant."

In *Compton's Case* (22 Lib. Ass. 97, pl. 55, translated 16 H. L. R. 569), Thorpe, C. J., said:

> When a man kills another by his warrant he may well avow the fact, and we will freely acquit him without waiting for the King's pardon by his charter in the case. And in many other cases a man may kill another without impeachment, as if thieves come to rob a man, or to commit burglary in his house, he may safely kill them, if he can not take them. And note how it was with a gaoler who came to the gaol with a hatchet in his hand, and just then the prisoners had broken their irons, and were all ready to have killed him, and they wounded him sorely, but with the hatchet in his hand he killed two and then escaped, &c. And it was adjudged in this case by all the council that he would not have done well otherwise, &c. Likewise he said that every person might take thieves in the act of larceny and felons in the act of felony, and if they would not surrender peaceably, but stood on their defence, or fled, in such case he might kill them without blame, &c.

Such and other cases are summed up in Pollock and Maitland, Vol. II, p. 477, thus:

> The man who commits homicide by misadventure or in self-defence deserves but needs

> a pardon. Bracton can not conceal this from us and it is plain from multitudinous records of Henry III's reign. If the justices have before them a man who, as a verdict declares, has done a deed of this kind, they do not acquit him, nor can they pardon him, they bid him hope for the king's mercy.

By Statute of 24th Henry VIII, Ch. 5 (1532), after a preamble stating that doubt had arisen whether persons who killed another who was attempting to rob or murder any person on or near a highway, etc., or in a mansion, etc., or to commit burglary would forfeit their goods to the king, as a person would who should happen to kill in chance medley in his own defense, it was provided that such persons causing death under such circumstances should not forfeit their goods but should be "acquitted and discharged" in like manner as if "they were lawfully acquitted."

As Prof. Beale points out, this statute must mean that at the time it was not clear whether the killing of a murderer or robber was wholly justifiable, or whether it was merely excusable and therefore needed a pardon involving, probably, a forfeiture of goods, etc. The statute in effect dispensed with a pardon in such cases. In 1663—*Cooper's Case*, Cro. Car. 544—the statute was held to justify acquittal of a person who killed one breaking into a house with intent to commit burglary or to kill any one therein; and it was said to have been made "in affirmance of the common law." (As to this last statement, see P. & M., Vol. II, p. 479.)

Two writers prior to Coke are referred to in Stephen, *supra*. Of Staundforde (Pleas of the Crown), Stephen says (Vol. III, p. 47):

> The principal part of Staundforde's commentary upon Bracton consists of authorities which show how far Bracton's distinction between inevitable and evitable necessity had been reduced to a certainty. He specifies as cases of inevitable necessity killing in order to arrest, and the cases mentioned in the two statutes above referred to, namely, 21 Edw. I, "de malefactoribus in parcis," &c., and 24 Hen. 8, c. 5, as to killing robbers and burglars. As cases of avoidable necessity he reckons all cases of killing in self-defence other than those protected by the statute of Henry VIII, even if the act was necessary to save the life of the person killing.

As to Lambard (1610) Stephen gives (Vol. III, p. 49) his table of homicide contained in his Eirenarcha at page 225, from which it clearly appears that justifiable homicide, which is no crime at all, is analogous to killing in aid of justice, and that *all* homicide in self-defense merely comes under the head of excusable, and is not the same as "chance medley." In addition he carefully distinguishes homicide "allowed by law" (in which he includes only those "for the advancement of justice"—see p. 234) from homicide in self-defense. As to the latter, he says (pp. 252, 253):

> The last member of voluntarie Homicide, is where one man killeth an other in his owne

defence: and this is neither felonie, or yet anie justifiable killing: but even as the Law of nature (as Cicero in his defence of Milo said) both allow unto man, *Omnem honestam rationem expediendae salutis:* So the Lawes of men do sometime reach unto him *gladium ad occidendum hominem.* And therefore, our Law also is a Sanctuarie for the life and lands of him that killeth an other in the necessitie of his owne defence, if hee cannot otherwise escape with his life from him.

But hee must know, that it is not all one to have to do with a thiefe, or murderer, and with a loyall subject. For albeit hee may boldly defend himselfe, his goods, or his house against a murderer or thiefe, or even hand (as it were) and without any shrinking from him: yet if he be assayled by an other maner of man, he must flie so farre as hee may, and till he bee letted by some wall, hedge, ditch, presse of people, or other impediments: that his necessitie of defence may bee esteemed altogether great and inevitable, and yet shal he be committed til the time of his triall, and shall then loose his goods, and seeke his pardon, for taking away the life of his fellowe subject, Stat. Gloucest. cap. 9.

Coke, in his 3d Institutes, c. 8, p. 55, states the law confusedly, but clearly enough on the point now being considered:

Some be voluntary, and yet being done upon an inevitable cause are no felony. As if A. be assailed by B. and they fight together, and before any mortall blow given A. giveth back,

untill he cometh unto a hedge, wall, or other strait, beyond which he cannot passe, and then in his own defence, and for safeguard of his owne life killeth the other: this is voluntary, and yet no felony, and the jury that finde, it was done *se defendendo*, ought to finde the speciall matter. * * * If A. assault B. so fiercely and violently, and in such a place, and in such manner, as if B. should give back, he should be in danger of his life, he may in this case defend himselfe; and if in that defence he killeth A, it is *se defendendo*, because it is not done *felleo animo:* for the rule is, when he doth it in his own defence, upon any inevitable cause, *Quod quis ob tutelam corporis sui feverit, jure id fecisse videtur.*

Some without any giving back to a wall, &c. or other inevitable cause. As if a thiefe offer to rob or murder B. either abroad, or in his house, and thereupon assault him, and B. defend himselfe without any giving back, and in his defence killeth the thief, this is no felony; for a man shall never give way to a thief, &c. neither shall he forfeit any thing. And so it is declared by the statute of 24 H. 8. Likewise if a prisoner assault the gaoler, the gaoler is not by law inforced to give back: but if in defence of himselfe he kill the prisoner, this is no felony.

So if any officer, or minister of justice, that hath lawfull warrant, and the party assault the officer or minister of justice, he is not bound by law to give back, but to carry him away: and if in execution of his office he cannot otherwise avoid it, but in striving kill him, it is no felony. And in that case the officer or minis-

> ter of justice shall forfeit nothing, but the party so assaulting or offering to flye away, and is killed, shall forfeit his goods and chattels.

This, according to the authorities cited above, is a correct statement of the law. It is evident that Coke knows nothing of any justifiable homicide dispensing with retreat, except where the killing is in aid of justice.

Hale states the law in accord with Coke in so far as the present point is concerned. He says of homicide generally (Pleas of the Crown, Vol. I, pp. 424, 425):

> And this is of three kinds: Purely voluntary, *viz.* murder and manslaughter. Purely involuntary, as that other kind of homicide *per infortunium*. 3. Mixt, partly voluntary, and partly involuntary, or in a kind necessary, and this again of two kinds, *viz.* inducing a forfeiture, as *se defendendo*, or not inducing a forfeiture, as, 1. In defense of a man's house. 2. Defense of his person against an assault in *via regia*. 3. In advancement or execution of justice, and according to this distribution I shall proceed.

Here it is clear that all homicides in self-defense are merely excusable, the only justifiable killing being in aid of justice, or derived from the equity of the statute of 24 Henry VIII, c. 5, *supra*, as being in defense of a house or on a public way.

In regard specially to homicides in self-defense Hale says in Ch. XL (pp. 478 *et seq.*):

> I come to those homicides that are *ex necessitate*, and this necessity makes the homicide not

simply voluntary, but mixed, partly voluntary and partly involuntary, and is of two kinds.

1. That necessity, which is of a private nature.

2. That necessity, which relates to the public justice and safety.

The former is that necessity, which obligeth a man to his own defense and safeguard, and this takes in these inquiries, 1. What may be done for the safeguard of a man's own life. 2. What may be done for the safeguard of the life of another. 3. What may be done for the safeguard of a man's house of habitation.

I. As touching the first of these, viz. homicide in defense of a man's own life, which is usually styled *se defendendo.*

* * * * *

First, therefore, of common homicide *se defendendo.*

Homicide *se defendendo* is the killing of another person in the *necessary* defence of himself against him that assaults him.

* * * * *

3. Regularly it is necessary, that the person that kills another in his own defense, fly as far as he may to avoid the violence of the assault before he turn upon his assailant; for tho in cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour, because the king and his laws are to be the *vindices injuriarum,* and private persons are not trusted to take capital revenge one of another.

But this hath some exceptions.

* * * * *

2. In relation to the person killed.

If a thief assaults a true man either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not felony. *Co. P. C. p. 56* (7).

In respect of the manner of the assault.

If *A.* assault *B.* so fiercely, that *B.* cannot save his life if he give back, or if in the assault *B.* fall to the ground, whereby he cannot fly, in such case if *B.* kill *A.* it is *se defendendo, Co. P. C. p.* 56. but now here will be occasion to resume the former debate, where the first assailer may be said to kill the assailed *se defendendo.*

It is clear from paragraph 3 above that Hale only dispenses with retreat when the killing is in aid of justice.

Certain cases may be referred to before considering Foster's treatment of the matter. In *Daver's Case* (1623) Godbolt 288, it was held:

> And if two men fight together, and one flieth as far as he can, and he which flieth killeth him who doth pursue him, the same is *se defendendo.* Also if one man assaulteth another on the highway, and he who is assaulted killeth the other, he shall forfeit neither life, nor lands, nor goods, if he who killed the other fled as far as he could.

In *Calfield* v. *the Keeper* (Rolls Reps. 189), there is what appears to be Roll's opinion that where the keeper killed a prisoner for debt, who had escaped and

was resisting arrest, it was manslaughter, since the keeper did not go back as far as he could; but otherwise, if the imprisonment were for a felony, or if the deceased was a robber.

Sir Michael Foster published his Discourse on Homicide in 1762. He first states that homicide is either occasioned by accident (the old *per infortuniam*), or is founded in justice, or in necessity (Foster Crown Law, p. 255). In Ch. II, page 267, he takes up homicides founded in justice, and confines them to cases where a person is killed while resisting an officer having authority to arrest, or where a felon is killed resisting apprehension by any one. In Ch. III, page 273, he treats of homicide founded in necessity and says:

> Self-defence naturally falleth under the Head of Homicide founded in Necessity, and may be considered in Two different Views.
>
> It is either that Sort of Homicide *Se & Sua defendendo* which is perfectly Innocent and Justifiable, or that which is in some Measure Blameable and barely Excusable. The Want of attending to this Distinction hath, I believe, thrown some Darkness and Confusion upon this Part of the Law.
>
> The Writers on the Crown-Law, who I think have not treated the Subject of Self-Defence with due Precision, do not in Terms make the Distinction I am aiming at, yet All agree that there are Cases in which a Man may without retreating oppose Force to Force, even to the Death. This I call Justifiable Self-Defence, They Justifiable Homicide.

They likewise agree that there are Cases in which the Defendant cannot avail Himself of the Plea of Self-Defence without shewing that He retreated as far as He could with Safety, and then meerly for the Preservation of his own Life Killed the Assailant. This I call Self-Defence Culpable, but through the Benignity of the Law Excusable.

In the Case of Justifiable Self-Defence the injured Party may repel Force with Force in Defence of his Person, Habitation, or Property, against one who manifestly intendeth and endeavoureth with Violence or Surprize to commit a known Felony upon either. In these Cases He is not obliged to retreat, but may pursue his Adversary 'till He findeth himself out of Danger, and if in a Conflict between them He happeneth to Kill, such Killing is Justifiable.

The Right of Self-Defence in these Cases is founded in the Law of Nature, and is not nor can be superseded by any Law of Society. For before Civil Societies were formed, one may conceive of such a State of Things though it is difficult to fix the Period when Civil Societies were formed, I say before Societies were formed for mutual Defence and Preservation, the Right of Self-Defence resided in Individuals; it could not reside elsewhere. And since in Cases of Necessity, Individuals incorporated into Society cannot resort for Protection to the Law of Society, that Law with great Propriety and strict Justice considereth them as *still in that Instance* under the Protection of the Law of Nature.

> I will by way of Illustration state a few Cases which I conceive are reducible to this Head of Justifiable Self-Defence.
>
> Where a known Felony is attempted upon the Person, be it to Rob or Murder, here the Party assaulted may repel Force with Force, and even his Servant then attendant on Him, or any Other Person present may interpose for preventing Mischief; and if Death ensueth, the Party so interposing will be justified. In this Case Nature and Social Duty cooperate.

He cites no authority whatsoever for this view except certain remarks of Chief Justice Holt delivering the opinion of the court in *Mawgridge's Case* (Kelyng's Cr. Cas. 119, 128), which were not intended to touch the point raised by Foster. It is doubtful whether the latter did not know that the law was not in fact as he stated it, and only desired to rationalize it. On page 289 he admits that Bracton and Fleta knew only one kind of self-defense—that which was barely excusable—and he might have added that no other writer before himself had even hinted at the two classes on which he lays so much stress.

As to self-defense which is culpable and merely excusable, Foster confines it to cases of a mutual, sudden brawl or affray (which he calls chance medley) (Cr. Law, p. 275). For this view he relies entirely on an analysis of the Stat. 24, Henry VIII, c. 5 (Crown Law, pp. 275, 276). This statute, however, does not afford the slightest basis for Foster's distinction. It merely attempted to correct the evil of the King's forfeiting the goods of persons who either could not bring them-

selves within the strictness of the common law as to homicides in aid of justice, or, if they could, had fled. This is shown by the authorities given above and by the discussion of it in Pollock and Maitland and Stephen. Reference may also be made to the case of *Punter* v. *Newman*, an appeal for murder reported in Anderson, p. 41. There, although the appellee had retreated as far as possible before killing, a forfeiture was decreed because the particular words of the statute, viz, that he had been assaulted on or near a highway with intent to murder, were not used. It must be understood that the word "murder" in the statute had a special meaning and implied cruelty and secret premeditation.

The fact that Foster was merely rationalizing about a law which, for lack of materials, he did not understand, can be seen from Hawkins (Pleas of the Crown, Vol. I, pp. 104–115), for while the latter divides homicides into justifiable and excusable, he places homicides in self-defense in the latter class, and places in the former only homicides in the nature of an aid to justice, as killing a robber or murderer attacking on a highway or in a house (Pleas of the Crown, p.108). This is clearly brought out by his statement on page 109 that he sees no reason why the law makes the distinction between robberies, etc., and the general case of one assaulting another in such a manner as to show an intent to murder him. He thinks that in both cases killing is justifiable, but he does not so state the law and evidently knew that it was not so.

It is evident, therefore, that Foster's statement does not represent the common law. What that law, apart from its archaic features, was is stated with entire correctness by Judge Campbell in *Pond* v. *People*, 8 Mich. 150, 177:

> The essential difference between excusable and justifiable homicide rests not merely in the fact that at common law the one was felonious, although pardoned of course, while the other was innocent. *Those only were justifiable homicides where the slayer was regarded as promoting justice; and performing a public duty; and the question of personal danger did not necessarily arise, although it does generally.* [Italics ours.]

The archaic features which Foster did not understand and which caused him, therefore, to overlook the true distinction were that, owing perhaps to the idea of personal vengence and compensation embodied in the murder fine and the appeal, or perhaps to the lack of any machinery for nicely distributing blame for homicide, the early common law made homicide by misadventure or in self-defense a crime. This not being in accord with more enlightened ideas, the King at first granted a pardon of his grace, then as of course, on a special verdict setting out the facts. It was easy from this to allow the jury to take the short cut of acquitting in such cases, and this was done. Such procedure, however, had no bearing whatsoever on the question, viz., what facts made out a case of self-defense, or what was the extent of the right of a person defending himself from an assault.

This always remained the same. A man could protect his person from unlawful assault and was excused for the results provided he did no more than was reasonably necessary under all the circumstances. This general principle is stated as early as Bracton, where it is said of homicides (f. 120 b):

> From necessity, in which case it must be distinguished, whether that necessity was avoidable or not. But if it were avoidable, and he could avoid it without slaughter, then he will be guilty of homicide. But if it was inevitable, since he slew a man without any meditation of hatred, in fear and grief of mind, in delivering himself and his property, when he could not otherwise escape, he is not liable to the punishment of homicide.

From 1300 we may skip to 1910 and find the same principle stated in *Morse's Case*, 4 Cr. App. Cas.50, where the court said:

> Now we will assume that appellant's statement is absolutely correct. That would justify him in defending himself, but in doing nothing more than was necessary in his own defence. But he, on being assaulted by Hill, did not casually pick up a razor lying near, but took one out of his pocket. That shows intention. He gave him not one but two cuts on the head, which were very dangerous. The case was quite properly left to the jury with the direction, "Did he use more violence than was reasonably necessary to repel the attack?"

So in the characteristically interesting and learned opinion of Judge Doe in *Aldrich* v. *Wright*, 53 N. H. 398, 404, 405, it is said, *inter alia:*

> The right of defence is the right to do whatever apparently is reasonably necessary to be done in defence under the circumstances of the case.
>
> It is reasonable that the kind and amount of defensive force should be measurably proportioned to the kind and amount of danger, to the apparent consequences of using the force, and the apparent consequences of not using it.
>
> The right to kill a man in self-defence is not the test of the right to kill a dog in self-defence. Reasonable necessity is the test in both cases; but what is reasonably necessary against a canine assailant may not be reasonably necessary against a human one, although the same danger be caused by each.

Nevertheless, on account of Foster's great reputation and perhaps of his pseudo-philosophical language, his statement has had great weight, and has been repeated as law many times. Even so late as 1918 in Kenny's Outlines of Criminal Law, 8th ed., pp. 103, 104, it is repeated without comment or other citation of authority. On the other hand, we are not able to find that it has ever had any effect on actual cases in the English courts. In *R.* v. *Smith* (1837), 8 C. & P. 160, Bosanquet, J., with the concurrence of Bolland, B., and Coltman, J., said:

> But there is another question, Did he use the weapon in defence of his life? Before a

> person can avail himself of that defence, he must satisfy the jury that that defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance and no means of escape, in such case, if he retreated as far as he could, he will be justified.

In *R.* v. *Bull* (1839), 9 C. & P. 22, Vaughan, J., with the concurrence of Williams, J., said:

> * * * the question for their consideration was, whether the conduct of the party made it *necessary* for the prisoner to inflict that blow which almost immediately terminated in the death of the deceased—whether he inflicted the wound in self-defence, to save his own life, which was in danger, or to protect himself from some dreadful bodily injury.

In *R.* v. *Knock* (1877), 14 Cox Cr. Cas. 1, Lindley, J., said:

> But on the other hand, if a man attacks me, I am entitled to defend myself, and the difficulty arises in drawing the line between mere self-defence and fighting. The test is this: A man defending himself does not want to fight, and defends himself solely to avoid fighting.

In *R.* v. *Rose* (1884), 15 Cox Cr. Cas. 540, Lopes, J., said:

> Homicide is excusable if a person takes away the life of another in defending him-

> self, if the fatal blow which takes away life is necessary for his preservation. The law says not only in self-defence such as I have described may homicide be excusable, but also it may be excusable if the fatal blow inflicted was necessary for the preservation of life. * * * Therefore, I propose to lay the law before you in this form: If you think, having regard to the evidence, and drawing fair and proper inferences from it, that the prisoner at the bar acted without vindictive feeling towards his father when he fired the shot, if you think that at the time he fired that shot he honestly believed, and had reasonable grounds for the belief, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life, then he ought to be excused, and the law will excuse him, from the consequences of the homicide.

In *R.* v. *Symondson* (1896), 60 Justice of the Peace 645, Kennedy, J., said:

> There are cases in which the life of another may be taken not unlawfully, but such cases, where persons take the law into their own hands, must be watched very carefully. There are occasions in which the supreme necessity of self-defence protects the person who takes another's life: "The intentional infliction of death or bodily harm is not a crime when it is inflicted by any person in order to defend himself or any other person from unlawful violence, provided that the person inflicting

> it inflicts no greater injury in any case than he in good faith and on reasonable grounds believes to be necessary when he inflicts it." (Stephen's Digest of the Criminal Law, art. 200.) But it is not any assault that will justify the use of the pistol; the danger measures the right.

As to the above quotation from Stephen's Digest, that authority is not quite clear. Stephen continues the citation above as follows:

> (a) If a person is assaulted in such a manner as to put him in immediate and obvious danger of instant death or grievous bodily harm, he may defend himself on the spot, and may kill or wound the person by whom he is assaulted.

But immediately afterwards he says:

> (c) If a person is unlawfully assaulted by another without any fault of his own, and otherwise than in the cases provided for in clauses (a) and (b), but with a deadly weapon, it is his duty to abstain from the intentional infliction of death or grievous bodily harm on the person assaulting, until he (the person assaulted) has retreated as far as he can with safety to himself.

It is difficult to see where (a) and (c), *supra*, differ, and it may be that Stephen means no more than that a man assaulted need not retreat if the danger is so imminent as to make retreat dangerous.

Foster's statement, *supra*, has, however, been often quoted, and relied on by the courts of this

country, but it is not clear that it had any effect on the Federal courts prior to the decision in *Beard's Case*, 158 U. S. 550. It is true that in *United States* v. *Travers* (1814), 2 Wheeler Cr. Cas. 490, Judge Davis (pp. 497, 498), and Justice Story (p. 507) state the law almost in Foster's language, but it is not clear that the point was important in the case or was called to the attention of the judges. In *United States* v. *Wiltberger* (1819), 3 Wash. 515, 521, Justice Washington said:

> As to this, the law is, that a man may oppose force to force, in defence of his person, his family, or property, against one who manifestly endeavors, by surprise, or violence, to commit a felony, as murder, robbery, or the like. * * *
>
> In the next place, the intent to commit a felony must be apparent, which will be sufficient; although it should afterwards turn out that the real intention was less criminal, or was even innocent. This apparent intent is to be collected from the attending circumstances, such as the manner of the assault, the nature of the weapons used, and the like; *and, lastly, to produce this justification, it must appear that the danger was imminent, and the species of resistance used necessary to avert it.* [Italics ours.]

In *United States* v. *Outerbridge* (1868), 5 Sawyer 620, Justice Field adopts the language of Justice Washington quoted above.

In *United States* v. *Mingo* (1854), 2 Curt. 1, 5, Justice Curtis said:

> If it was not a mutual combat, but Johnson made the first attack on Mingo with a deadly weapon, yet if Mingo could reasonably have avoided killing his adversary, without certain and immediate danger of his life, or of great bodily injury, the homicide is not excused as being in self-defence.

In *United States* v. *King* (1888), 34 Fed. 302, 307, 308, Judge Lacombe said:

> Was this homicide excusable? Now, there are varieties of excusable homicide. For instance, homicide by misadventure—that is, by pure accident, without negligence—is excusable. But the only kind of excusable homicide that there is any pretense of here, or that you need in any way concern yourselves with is what is known as "homicide in self-defense." Under the law a person has a right to resist the application of force to himself with force proportioned to the attack. * * * If an assailant comes against me with a deadly weapon, apparently meaning to use it, or if without such a weapon he assails me, breathing forth threatenings and slaughter, or by any other means indicating that it is his intention to inflict upon me a beating of such a character as to imperil life, or to maim me, or do me grievous bodily harm, then I may take life, when necessary to repel the assault. That is the general rule, and I have no doubt that it commends itself to your good sense.

> But, like all rules, it must be studied with its qualifications; and the first qualification to which I desire to call your attention is this: It is my duty when attacked to retreat as far as the fierceness of the assault would permit. * * * The rule laid down by later authorities and sanctioned by text writers of ability is this: It is the duty of the assailed to abstain from the infliction of death until he has retreated as far as he can with safety to himself. Here let me call your attention to a very apt illustration which is used—whether in a reported case or whether as the expression of a text writer I am not certain, but it is a convenient illustration to have before you. Manslaughter and excusable homicide, as you will see later on, approach each other very nearly, and the distinction between them is thus indicated: "In excusable homicide the slayer could not escape if he would; in manslaughter he would not escape if he could."

The law was similarly stated with emphasis upon the duty to retreat by Judge Maxey in *United States* v. *Lewis* (1901), 111 Fed. 630, 635.

The above observations and citations of authority are necessary on account of the apparent want of harmony in the language used in the opinions of this Court on the subject of the duty to retreat before an unlawful assault, which decisions must now be considered.

In *Beard* v. *United States* (1895), 158 U. S. 550, Mr. Justice Harlan, delivering the opinion of the

Court, after referring with evident approval to the leading cases denying the duty to retreat, namely, *Erwin* v. *State*, 29 O. S. 186, and *Runyan* v. *State*, 57 Ind. 80, and to Foster's statement of the law as given above, said (158 U. S. 564):

> The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.

In this case the defendant was in his own house, and in view of the decision hereafter discussed in *Allen* v. *United States* (164 U. S. 492), it should be limited as relating to a man's right not to retreat when assailed in his own house.

In *Alberty* v. *United States* (1896), 162 U. S. 499, 507, 508, Mr. Justice Brown, delivering the opinion of the Court, refers to *Beard's Case* as representing the law, but his statement lays so much stress on the peculiar facts of the case before him, viz., the

deceased's attempt at night to gain access to the room of the wife of the defendant, as to make it doubtful whether he means to lay down any general principle. This case might well stand on the right to repel invasion of one's house and protection of one's wife.

In *Rowe* v. *United States* (1896), 164 U. S. 546, 557, Mr. Justice Harlan, delivering the opinion of the Court (Justices Brown and Peckham dissenting), quotes the language given above in *Beard's Case*, and says it represents "the principle announced" in that case.

In *Addington* v. *United States* (1897), 165 U. S. 180, 187, Mr. Justice Harlan, delivering the opinion of the Court, said of a charge that a person assaulted and placed in peril of his life or great bodily harm was under a duty "to avoid the threatened danger if he can" "might" be inconsistent with the right of self-defense as defined in *Beard's Case*, but that the error, if any, was cured by a charge that the defendant should be acquitted if the jury believed "that the means he used were the only reasonable means at his command to avert the threatened danger, and that he only fired in his own actual self-defense." Mr. Justice Harlan continued:

> This instruction is not liable to the objection that it recognized Addington's right to take the life of his adversary only upon its appearing that he was, in fact, in actual danger of losing his own life or of receiving serious bodily harm. On the contrary, the

> court said, in substance, that if the circumstances were such as to produce upon the mind of Addington, as a reasonably prudent man, the impression that he could save his own life, or protect himself from serious bodily harm, *only* by taking the life of his assailant, he was justified by the law in resorting to such means, * * *. [Italics ours.]

It is not clear, therefore, whether Mr. Justice Harlan meant, in *Addington's Case*, to reaffirm the general statement of the right to kill without retreating, made by him in *Beard's Case*, or not, or to extend it beyond the exact case there presented.

On the other hand, in *Allen* v. *United States* (1896), 164 U. S. 492, the trial court gave the following charge (164 U. S. 497):

> The law of self-defence is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character, or that may produce great bodily harm, against which you can exercise a deadly attack. If he is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm from which death or permanent injury may follow, in such a case he may lawfully kill the assailant. When? Provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him, if it be in his power.

Of this charge Mr. Justice Brown, delivering the opinion of the court, said (164 U. S. 498):

> Nor is there anything in the instruction of the court that the prisoner was bound to retreat as far as he could before slaying his assailant that conflicts with the ruling of this court in *Beard* v. *United States*, 158 U. S. 550. That was the case of an assault upon the defendant upon his own premises, and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house. So, too, in the case of *Alberty* v. *United States*, 162 U. S. 499, the defendant found the deceased trying to obtain access to his wife's chamber through a window, in the night time, and it was held that he might repel the attempt by force, and was under no obligation to retreat if the deceased attacked him with a knife. The general duty to retreat instead of killing when attacked was not touched upon in these cases. Whart. on Homicide, § 485.

To this statement there was no dissent.[4]

In *Andersen* v. *United States* (1898), 170 U. S. 481, 508, Chief Justice Fuller, delivering the opinion of the court, said that to make homicide excusable as in self-defense it must appear that it "was necessary in order to avoid the death or great bodily harm which was apparently imminent," and *Allen's Case* was cited with approval.

These appear to be all the relevant cases in this court on the question. The difficulty in properly

[4] *Allen's Case*, though reported before *Rowe's Case*, was in fact decided after it.

weighing them is increased by the possibility that the language used in them may have been colored by the facts peculiar to each. The statement of Mr. Justice Harlan in *Beard's Case* may be (and was by Mr. Justice Brown in *Allen's Case*) explained as laying down a rule applicable only to the case where the assaulted person is within the protection of his mansion or its curtilage. Under such circumstances there is evidently nowhere the assaulted person can retreat with safety, his house being for such purposes his wall or ditch. On the other hand, the petitioner herein claims, with some force, that in *Allen's Case* there was no assault with a deadly weapon, the deceased merely having a "willow stick with the bark peeled off with which to kill frogs." (150 U. S. 552.) The Court of Appeals in the present case distinguished *Beard's Case* on the ground just stated, and held *Allen's Case* controlling (257 Fed. 52–54).

No useful purpose could be served by commenting on or citing the numerous cases in the State courts expressing contrary views on the point now under consideration. They can be found in Wharton on Homicide, 3d ed., § 292, p. 469, n. 1; § 294, p. 471, 472, n. 1; in 21 Cyc., p. 822, n. 3 and 4; and in Professor Beale's Article on Self-Defence in Homicide, 3 Columbia L. R., p. 539, n. 5, p. 540, n. 1.

Leaving out of view for the moment the question as to the correct rule on reason and principle, we claim that we have absolutely established by what has been said above that the common law gives no justification whatsoever to the claim of the petitioner

herein or to the general statement of Mr. Justice Harlan in *Beard's Case*. Two propositions may be confidently asserted as to that law.

1. It knew nothing of two kinds of homicide in self-defense, mutually destructive. If Foster's statement were correct it would follow that on an assault with manifest intent to commit a known felony on the person assaulted there would be (a) no duty to retreat generally, but (b) a duty to retreat if this manifest assault was part of a "chance medley." Such a distinction is clearly impracticable and impossible of application before a jury. It merely adds an artificial, refined distinction to a subject which, as much as any, should be kept clear and simple. How can a jury determine, first, whether the assault was or was not made with manifest intent to commit a felony on the person assaulted, and then, second, whether the line had or had not been crossed which made the affair a "chance medley," a brawl, or an affray, and hence made the assault with manifest intent to commit a felony immaterial? It would do nothing but confuse the jury to tell them that if the defendant was assaulted with manifest intent to commit a felony he need not retreat, but that if he was so assaulted in a chance medley he must. The common law had no such antinomy but treated all cases of self-defense upon the same principles.

2. As it recognized only one species of homicide in self-defense, so the common law applied without question to all such homicides the rule that the person assaulted was under duty to avoid killing his assailant

by retreating, if that was practically possible under the circumstances as they appeared to him. Of this there can be no doubt. It is so stated in all the authorities. Even Foster admits it as to what he calls excusable homicide in self-defense; and when his distinction of two species of such homicides disappears (as it does in so far as the common law is concerned), the rule, since its existence is admitted, must extend as well to his so-called justifiable homicide in self-defense.

Even assuming that Foster's statement can be taken as in any way representing the common law, it should not be extended to cases (like the present) where the assault from which the right to kill is derived is no more than, but, on the contrary, is exactly equivalent to the assault with manifest intent to commit a felony specified in the alleged rule. On the contrary, the doctrine of Foster, if it is to be adopted at all, should be limited to cases where the assault in question is merely a collateral means to carry out an independent intent to commit a felony, as where A lies in wait for B, to murder him, and on his approach attacks him. If the rule be so limited, it does not apply to the case at bar because there is no evidence of any independent intent on the part of Hermis to murder petitioner, but, on the contrary, the evidence of the latter himself shows that Hermis came to the excavation to haul dirt, and that the assault was induced by petitioner's statement in regard to such hauling.

Assuming, therefore, that no support can be found in the common law for the claim of the petitioner herein, and assuming further that *Allen's Case, supra*, is not a direct authority against that claim (we submit that it is), the only remaining question is, what rule best conforms to principle and reason?

The general basic principle which must govern the answer to this question can hardly be disputed. In order to excuse (or to justify, if that word be preferred) the taking of human life, it must appear that the killing was reasonably necessary to protect other interests which for good reasons the law regards as more important, under all the circumstances, than the continued existence of the life in question. The difficulty lies in defining such "other interests." In so far as self-defense is concerned, the normal case of another interest is the life of a person other than the one killed. If the protection of that life makes necessary the homicide in question, there can be no doubt that the law must excuse or justify the killing. An extension of the same principle justifies protection of the person from great bodily harm. This principle, however, would evidently require, as a mere expansion of the content of the idea, that the homicide in question be reasonably necessary to protect another person from death or great bodily harm. If it be not so reasonably necessary, if the homicide could be avoided without danger of death or great bodily harm, the justification or excuse fails. But one evident method of avoiding a homicide is to avoid a conflict

from which it may arise, and hence to retreat if assaulted, provided such a retreat would, under all the circumstances as they present themselves to the person assaulted, accomplish the end desired by the law viz, to preserve human life if it can be done without seriously endangering other human lives. The rule of the common law, therefore, that the person assaulted is bound to retreat provided such a retreat would not be dangerous to his personal safety, is clearly founded on a reasonable, sensible principle, and goes as far as such reasonable principle requires, if the only "other interest" had in mind is the life and personal safety of the one assaulted.

The rule laid down by Foster and approved by Mr. Justic Harlan, however, viz, that a person assaulted under such circumstances as to induce a reasonable belief that his life is aimed at need not retreat nor consider whether he can safely retreat, but may stand his ground and kill, must be supported by a respect for some interest which the law ought to protect other than human life or personal safety, since the latter are sufficiently protected by the very terms of the common law rule. The only "other interest" which (so far as we can see) can be had in mind is the self-respect and honor of the person assaulted. The question therefore is whether such self-respect and honor are in the eye of the law sufficient to weigh down the balance as against human life. We submit that they are not. A lengthy argument would not be justified, as the matter is one depending upon general considerations of life in civilized so-

cieties known to all intelligent persons. We can not do better than quote Professor Beale's language in 16 Harv. Law Rev., pp. 581, 582:

> A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands. It is undoubtedly distasteful to retreat; but it is ten times more distasteful to kill. The position of the assailed is an unpleasant one. The law can not help that; it is incapable of protecting him from the painful alternative; but the necessity of undergoing illegal injuries is one of the penalties of life in society. He does not avoid his predicament by killing. * * *
>
> If the law is to be carried out it must protect the state against such homicides. The interests of the state alone are to be regarded in justifying crime; and those interests require that one man should live rather than that another should stand his ground in a private conflict.

## IV.

### REFUSAL TO GIVE CHARGE ON ASSAULT WITH INTENT TO MURDER.

The petitioner requested the judge (R. 168, 169) to charge that if the jury had a reasonable doubt whether the third or fourth shot was fatal, and if the third shot was fired under excusable circumstances, though the fourth shot was not, then the

petitioner would be guilty only of assault with intent to murder, in violation of section 276, Criminal Code. The following assumptions are involved in this request; (*a*) the third shot was the fatal one; (*b*) it was fired in self-defense; (*c*) the fourth shot was intentional; (*d*) it was not fired in self-defense; (*e*) it was not sufficient, taken in connection with the other shots, to produce death. As to (*b*) the jury is asked to credit petitioner's testimony; as to (*c*) it is asked to discredit it; as to (*a*) it is asked to believe that a man with the thoracic aorta completely severed could still attack and strike as petitioner testified Hermis did (R. 132); as to (*e*) it is asked to pass upon a matter of which it could know nothing on the testimony before it. Such a mixture of unfounded, inconsistent hypotheses furnishes no basis for a charge to a jury in a trial of homicide, unless the trial is looked at as a game in which the defendant is permitted to escape if he can raise dust and smoke enough to conceal him while he is getting away.

CONCLUSION.

The judgment of the District Court should be affirmed.

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